Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION,

Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Clean Air Act provisions governing national ambient air quality standards, and the Environmental Protection Agency's interpretation of those provisions, represent an unconstitutional delegation of legislative authority.

2. Whether the court of appeals erred in calling into question the Environmental Protection Agency's authority to implement new, more health-protective national ambient air quality standards for ozone.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

Petitioner American Lung Association (ALA) was an intervenor in the court of appeals. ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

The following were parties in one or both of the two consolidated proceedings addressed by this petition for certiorari (*American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1440 and consolidated cases; and *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 and consolidated cases):

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Lung Association
American Petroleum Institute
American Portland Cement Alliance
American Public Power Association
American Road and Transportation Builders Association
American Trucking Associations, Inc.
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Central Illinois Public Service Company
Central Power and Light Company
Chamber of Commerce of the United States
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Illuminating Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation (A merger of Centerior Energy Corporation and Ohio Edison Company)
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Kentucky Power Company

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Commonwealth of Massachusetts
David Matusow
Brian McCarthy
Meridian Gold Company
State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
Montaup Electric Company
National Association of Home Builders
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Small Business United
National Stone Association
Nevada Mining Association
State of New Jersey
Newmont Gold Company
Niagara Mohawk Power Corporation
Non-Ferrous Founders' Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
State of Ohio
Ohio Edison Company
Ohio Mining and Reclamation Association
Ohio Power Company
Ohio Valley Electric Corporation

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Oklahoma Gas & Electric Company
Otter Tail Power Company
PacifiCorp
Pennsylvania Power & Light Company
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company
Potomac Electric Power Company
PP&L Resources
Public Service Company of New Mexico
Public Service Company of Oklahoma
Richard Romero
Salt River Project Agricultural Improvement and Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Southwestern Electric Power Company
Tampa Electric Company
Texas Gas Transmission Corporation
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
United States Environmental Protection Agency
Virginia Power
West Penn Power Company
West Texas Utilities Company
West Virginia Chamber of Commerce
State of West Virginia
Western Fuels Association
Wisconsin Electric Power Company

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GLOSSARY OF ABBREVIATIONS

ALA	American Lung Association
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
CD	Criteria Document
COPD	chronic obstructive pulmonary disease
EPA	Environmental Protection Agency
NAAQS	national ambient air quality standard
OSHA	Occupational Safety and Health Act
PM2.5	particles less than or equal to 2.5 microns in diameter
PM 10	particles less than or equal to 10 microns in diameter
PM	particulate matter
ppm	parts per million
RIA	Regulatory Impact Analysis
RTC	Response to Comments
SP	Staff Paper

CITATIONS TO DECISIONS ENTERED IN THE CASE

The decision of the court of appeals is published at *American Trucking Assns. v. USEPA*, 175 F.3d 1027 (D.C. Cir. 1999), App. 1,[1] *rehearing granted in part, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), App. 64. The agency rules reviewed by the court of appeals are published at 62 Fed. Reg. 38652 (July 18, 1997), and 62 Fed. Reg. 38856 (July 18, 1997).

BASIS FOR JURISDICTION IN THIS COURT

The date the judgment or order sought to be reviewed was entered. The D.C. Circuit's judgment or order sought to be reviewed was entered on May 14, 1999, App. 1, and rehearing was granted in part and denied in part on October 29, 1999. App. 64.

The date of any order respecting rehearing. Rehearing was granted in part and denied in part on October 29, 1999. Rehearing en banc was denied that same date, with five of the nine participating judges voting for rehearing.

The statutory provision conferring certiorari jurisdiction on this Court. 28 U.S.C. § 1254.

[1] Appendix citations refer to the appendix filed by the Commonwealth of Massachusetts and the State of New Jersey with their petition for certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Constitution. U.S. Const., Art. I, § 1.

Statutes. Clean Air Act §§ 108, 109, 172, and 181, 42 U.S.C. §§ 7408, 7409, 7502, and 7511.

Regulations. 40 C.F.R. §§ 50.7, 50.9 and 50.10.

(The full text of these provisions is set out in the appendix to the petition of the Commonwealth of Massachusetts and the State of New Jersey.)

STATEMENT OF THE CASE

Acting pursuant to its duty to set national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety," Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1), the Environmental Protection Agency (EPA) has promulgated revised NAAQS for particulate matter (most importantly, for fine particles) and ozone. 62 Fed. Reg. 38711-12 (July 18, 1997), JA(PM) 61-62; 62 Fed. Reg. 38894-95 (July 18, 1997), JA(O) 39-40.[2] With respect to particulate matter, EPA estimates that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of

[2] In accordance with Rule 12.7, the present petition cites the joint appendices compiled in the court of appeals. The PM joint appendix is cited as JA(PM), and the ozone joint appendix as JA(O).

the new standards. Regulatory Impact Analysis (RIA) 12-43, JA(PM) 3486. With respect to ozone, EPA has estimated that its new standards will each year prevent tens of thousands of occurrences of health effects including respiratory symptoms (such as pain on breathing), reductions in lung function, and asthma attacks (including hospital admissions and emergency room visits). 62 Fed. Reg. 38865/2-3, JA(O) 10; *id.* 38868/1, JA(O) 13. It is these standards that the court of appeals has remanded.

Particulate matter. Particulate matter (PM) is a ubiquitous pollutant, consisting of fine particles produced largely by combustion or other high-temperature processes, and coarse particles mostly generated from mechanical processes through crushing and grinding. Criteria Document (CD) 3-145, JA(PM) 548; Staff Paper (SP) IV-3a, JA(PM) 1920. Over the years the public health significance of smaller particles has received increasing recognition. The original PM NAAQS promulgated in 1971 regulated particles up to 25 to 45 microns in diameter, 52 Fed. Reg. 24635/3 (July 1, 1987), JA(PM) 209, but EPA in 1987 promulgated revised NAAQS that addressed particles up to 10 microns in diameter ("PM10"). *Id.* 24663-64, JA(PM) 237-38. In 1997 EPA promulgated the PM NAAQS at issue here, which include a new NAAQS addressing "fine" particles, defined as those 2.5 microns in diameter or less. 40 C.F.R. § 50.7(a)(1).

These NAAQS were promulgated following a detailed and thorough review conducted by EPA pursuant to its statutory obligation to review and (as appropriate) revise NAAQS at no more than five-year intervals. CAA § 109(d). As required by the Act, EPA's review of the PM NAAQS involved presenting a comprehensive

review and assessment of the state of the science regarding particulate matter and its health and environmental effects in a "criteria" document, which was reviewed by a special scientific advisory committee (the Clean Air Scientific Advisory Committee, or CASAC). *See* CAA §§ 109(d); 108(a)(2). According to the final chapter of the Criteria Document, described by CASAC as the "best ever example of a true integrative summary of the state of knowledge about the health effects of airborne PM," Letter of March 15, 1996 from George T. Wolff to Carol M. Browner at 2, JA(PM) 3150,

> the extensive PM epidemiologic database that has evolved during the past several decades . . . includes recent studies providing evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban air sheds *even at concentrations below current U.S. PM standards.*

CD 13-1, JA(PM) 1779 (emphasis added). In sharp contrast to the "small" number of studies available in the 1987 PM review, 52 Fed. Reg. 24641/1, JA(PM) 215, and to other NAAQS reviews that have based standard-setting on a single study, 44 Fed. Reg. 8202/3 (February 8, 1979), JA(O) 3480 (noting that 1971 predecessor to the ozone standard was based on a single study), the studies relied on in the 1997 PM review include "over 80" addressing short-term exposures, of which "[o]ver 60 . . . have found consistent, positive, significant associations between short-term PM levels and mortality and morbidity endpoints." SP V-54, JA(PM) 2011. *Accord, id.* V-61a, JA(PM) 2026 (listing additional statistically significant studies

addressing long-term exposures). Significantly, when EPA plotted the results of the short-term exposure studies on a map, it concluded: "Although the highest PM-10 concentrations in the U.S. are in the West, most of the results in North America are from eastern communities, at PM-10 concentrations that are generally *below those permitted by the current standards.*" *Id.* front cover caption, JA(PM) 1900 (emphasis added).

As indicated, these PM-associated health effects include mortality, *i.e.*, death, largely from respiratory and cardiovascular causes. SP V-58, JA(PM) 2019. In addition, the studies documented associations between particulate matter and exacerbation of emphysema and chronic bronchitis (which collectively are known as "chronic obstructive pulmonary disease"),[3] as well as pneumonia and cardiovascular disease. *Id.* V-20, 21 and 32, JA(PM) 1974, 1976, and 1989. These exacerbations can be serious enough to lead the affected individuals to visit the emergency room, and to lead attending physicians to order that they be admitted to the hospital. CD 13-30, JA(PM) 1808. Persons specially at risk from these effects include those over 65 years of age, as well as those below that age who have acute or chronic respiratory disease and/or cardiovascular disease, or who are current or former smokers. CD 13-92 to 13-94, JA(PM) 1870-72.

Having noted these effects, EPA found that fine particles – which differ in size, chemical composition and origin from coarse particles, SP IV-4 to IV-8, JA(PM)

---

[3] COPD is "the most common pulmonary cause of death, the fourth leading cause of death overall, . . . and a major cause of disability." SP V-33, JA(PM) 1990.

1921-27 – were the appropriate indicator: "the fine particle studies consistently find positive, significant associations between fine particle levels and mortality and morbidity endpoints, with over 20 studies conducted in a number of geographic locations throughout the world, including the US, Canada, and Europe." SP V-76, JA(PM) 2047 (footnote omitted). Indeed, considering a study that compared the fine and coarse fractions, EPA found "clear evidence that fine particles are more likely to be responsible for the numerous observed associations between PM10 and mortality." SP V-64, JA(PM) 2031. *Accord, id.* V-67, JA(PM) 2037 (the 24-city study "provides clear evidence of an effect of fine particles that is independent of coarse fraction particles").

Considering these factors, and the near-unanimous recommendation of CASAC – including all four of the committee's epidemiologists – that a fine particle standard was warranted, Letter of June 13, 1996 from George T. Wolff to Carol M. Browner at Table 1, JA(PM) 3165, EPA opted to promulgate NAAQS for fine particles, measured as PM2.5. 62 Fed. Reg. 38711/3, JA(PM) 61 (setting annual standard at 15 μg/m3, and 24-hour standard at 65 μg/m3). The levels of the final standards are well within – indeed, "toward the middle portion of" – the range recommended by a majority of CASAC panelists. Response to Comments (RTC) 29, JA(PM) 268. EPA estimated that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of the new standards. RIA 12-43, JA(PM) 3486.

Ozone. Like particulate matter, ozone is a widespread pollutant occurring in numerous regions of the United States. The primary ingredient in what is known as "smog," it is formed when two precursor pollutants (volatile organic compounds and nitrogen oxides) react to sunlight. *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981); H.R. Rep. No. 490, 101st Cong., 2d Sess. 202 (1990).

Prior to 1997, the ozone NAAQS had focused on short-term concentrations measured over a one-hour averaging time. 36 Fed. Reg. 8187/3 (April 30, 1971), JA(O) 3540 (setting NAAQS at 0.08 ppm averaged over one hour); 44 Fed. Reg. 8220/3 (February 8, 1979), JA(O) 3498 (setting NAAQS at 0.12 ppm averaged over one hour). Subsequently, concern was raised by CASAC and others that "even in areas which do not repeatedly exceed the ozone standard, ozone concentrations can remain close to 0.12 ppm for several hours per day for extended periods of time in summer. There was concern based on recent controlled human exposure, epidemiology and toxicology studies, that such prolonged exposures could result in increased respiratory impairment." 58 Fed. Reg. 13018/2 (March 9, 1993), JA(O) 3459.

Several years after CASAC's observation, having compiled a revised criteria document addressing these and other studies, EPA noted that human experimental data documented health effects resulting from 6- to 8-hour exposures to ozone levels as low as 0.08 ppm:

> Based on a significant body of information available since the last review, there is now *clear evidence* from *human clinical studies* that O3 effects of concern are associated with the 6- to

> 8-hour exposures tested. . . . This includes evidence of the following statistically significant responses at 6- to 8-hour exposures to the *lowest concentration evaluated, 0.08 ppm O3*, at moderate exertion: lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation.

62 Fed. Reg. 38863-64, JA(O) 8-9 (emphasis added). *See also id.* 38872/1, JA(O) 17 ("the bulk of the human health effects evidence supporting a decision on an appropriate O3 standard is based on controlled human exposure studies that relate known O3 exposures directly to responses in individuals"); 38865/1, JA(O) 10 (noting that "field . . . and epidemiological studies" confirmed the results of the clinical studies: "effects were seen not only from controlled exposures to 0.08 ppm, but also in ambient environments in which 8-hour average O3 concentrations ranged from above to below the 0.08 ppm level").

Those most at risk from these effects are people who are active outdoors – *e.g.*, "active children and outdoor workers who regularly engage in outdoor activities." 62 Fed. Reg. 38859/3, JA(O) 4. In contrast to the studies underlying the prior NAAQS, which measured effects based on heavy exertion, the newer studies showed health effects under moderate exertion – a matter of concern because "[m]oderate exertion levels are more frequently experienced by individuals than heavy exertion levels." *Id.*

In addition to outdoor exertion, other factors increasing risk of harm from ozone exposure include respiratory

impairments such as asthma: "[t]he magnitude of individual changes can become more important in persons with impaired respiratory systems (e.g., asthmatics) who already have reduced baseline lung function." CD 9-26, JA(O) 1767. EPA heard vivid testimony concerning the effects of ozone on asthmatics:

> When I was four years old, I was playing outside on a really hot day and I started wheezing and my lungs started tightening up. So I came in and told my mom.
>
> We went to the doctor the next day and the doctor said I had asthma. The worst thing about having an asthma attack is that it almost feels like you are going to die because your lungs close up and it is really hard to breathe.
>
> The last two summers have been really bad for me. On days when the ozone is bad, I can't even go outside to play.

IV-F-84a at 168-69, JA(O) 3394-95 (ten-year-old Bethany Myles of Chicago).

> When there are ozone warnings, I can't be out of the air-conditioning. If I do go outside, I have an asthma attack. An asthma attack feels like I am suffocating. No one should have to feel this way.

Id. at 39, JA(O) 3389 (ten-year-old Jeff Damitz of Chicago). EPA estimated that twelve million Americans – one in twenty – are asthmatic. SP 39, JA(O) 1849.

Non-asthmatics likewise are at risk if they happen to be among those who are more sensitive to ozone: "[t]here is a large range of physiological responses among humans, with at least a 10-fold difference between the most and least responsive individuals." CD 9-4, JA(O)

1744. *See* McDonnell (1991), II-I-316, at 149, JA(O) 2775 (in laboratory study at 0.08 ppm, lung function decrements were as high as 37.9%); RTC 81 ¶ 5, JA(O) 161 (at 0.08 ppm, 10% of subjects had lung function decrements ≥20%). EPA heard testimony from these sensitive individuals as well:

> We had at least 26 days this summer of "unhealthful" ground level ozone under the ME [Maine] standard of .08 ppm. That's a big part of our summer, a very big part. This ground level ozone is a real problem, a serious problem.
>
> It's not just a statistical problem, either, because some standard was exceeded. I can feel it personally. I have exercised vigorously outside on "unhealthful" days and become physically sick – a funny nauseous feeling with a headache. I would go out and exercise at Ft. Williams Park and come home feeling queasy and think I had a bug. Before ozone warnings were given I would feel this sickness, and I began to associate it with hazy days, with how the air looked. Then after awhile I began to make associations with the way the air felt, then in the last few years I made the association with the ozone warnings. I have come home and told my wife how I felt and she has asked me if I checked the ozone level, and then I check it and realize the association. Now we are very aware of it. We can see it and feel it in the atmosphere without checking the DEP warnings. We know when it's more than .08. It's real and it's degrading our lives.

IV-F-102 at 1, JA(O) 3380 (Charles M. Sexton of South Portland, ME).

After considering the results of the studies, and the American Thoracic Society's criteria for defining which

health effects should be considered adverse, EPA concluded that "responses of some sensitive individuals [to 0.08 ppm] *are sufficiently severe and extended in duration to be considered adverse.*" 62 Fed. Reg. 38864/1, JA(O) 9 (emphasis added).

In addition to the human experimental data, EPA also noted that "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O3 exposures, *including O3 concentrations below the level of the current standard.*" *Id.* (emphasis added). As the Criteria Document noted, these studies "provide *strong evidence* that ambient exposures to O3 can cause *significant exacerbations of preexisting respiratory disease* in the general public at concentrations below 0.12 ppm O3." CD 7-171, JA(O) 1624 (emphasis added). EPA concluded that "increased hospital admissions and emergency room visits . . . are clearly adverse to individuals." 62 Fed. Reg. 38864/2, JA(O) 9.

In short, the evidence before EPA showed that health effects of concern (including adverse health effects) were occurring at levels allowed by the previous NAAQS, and at longer averaging times (6-8 hours, not just 1 hour). CASAC concluded that a new, 8-hour NAAQS was necessary: "It was . . . the consensus of the Panel that an 8-hour standard was more appropriate for a human health-based standard than a 1-hour standard." Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 2, JA(O) 237.

In acting on CASAC's consensus recommendation that an eight-hour NAAQS be set, EPA considered setting the level of the eight-hour standard at 0.09, which is the eight-hour level most comparable in protectiveness to the one-hour 0.12 ppm NAAQS. 61 Fed. Reg. 65725/2, JA(O) 51. Given the evidence documenting adverse health effects at levels allowed by the one-hour standard, EPA unsurprisingly rejected this option in favor of a more protective standard.

EPA presented the results of a risk assessment, which concluded that thousands more members of the group of greatest concern – children who are active outdoors – would suffer respiratory impairment and symptoms at a 0.09 ppm NAAQS than at a 0.08 ppm NAAQS. 62 Fed. Reg. 38865/2-3, JA(O) 10 (as compared to a 0.08 ppm NAAQS, a 0.09 ppm NAAQS would subject 70,000 more children to lung function decrements $\geq$15%, 39,000 more children to decrements $\geq$20%, and 14,000 more children to moderate or severe pain on deep inspiration). These figures applied only to nine urban areas, *id.* 38868/1 ¶ 2, JA(O) 13, and thus underestimate the number of ozone-induced effects that would occur nationwide.

The assessment also concluded that in New York City alone, a 0.09 ppm NAAQS would result in 40 more excess hospital admissions of asthmatics per ozone season than a 0.08 standard. *Id.* 38868/1, JA(O) 13. Even for that one city, this figure is "indicative of a pyramid of much larger numbers of related O3-induced effects, including respiratory-related hospital admissions among the general population, emergency and outpatient department visits, doctors visits, and asthma attacks and related increased

use of medication that are important public health considerations." *Id.*

EPA also considered other scientifically documented effects of 6- to 8-hour exposure to 0.08 ppm, including "increased nonspecific bronchial responsiveness (related, for example, to aggravation of asthma), decreased pulmonary defense mechanisms (suggestive of increased susceptibility to respiratory infection), and indicators of pulmonary inflammation (related to potential aggravation of chronic bronchitis or long-term damage to the lungs)." *Id.* 38868/1-2, JA(O) 13.

After weighing the evidence, EPA opted for an eight-hour standard at 0.08 ppm, a level consistent with the recommendations of CASAC. Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 3, JA(O) 238 (of ten panel members who expressed views, three favored 0.08 ppm, one endorsed a range of 0.08-0.09 ppm, and two endorsed the range presented by EPA (i.e., 0.07-0.09 ppm)). In responding to commenters who favored a 0.09 ppm standard because it would be equivalent to the 0.12 ppm one-hour standard, EPA noted that even at the chosen 0.08 ppm eight-hour level, "numerous controlled-exposure human studies have reported health effects such as lung function decrements, respiratory symptoms, and indicators of inflammation." RTC 13-14, JA(O) 93-94. *See also* 62 Fed. Reg. 38865/2-3, JA(O) 10 (even at a 0.08 ppm NAAQS, 180,000 children in the nine cities assessed would experience lung function decrements $\geq$15%, 58,000 would experience lung function decrements $\geq$20%, and 27,000 would experience moderate or severe pain on deep inspiration).

Proceedings Below. In the court below, industry and state petitioners challenged the NAAQS on a number of grounds in petitions for review under Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1). The court did not in any way question the validity of the science relied upon by EPA concerning either PM or ozone, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Nonetheless, the court of appeals held that the Clean Air Act, and EPA's interpretation of it, violate the nondelegation doctrine. App. 12. The court interpreted the requirement that Congress provide an "intelligible principle," *see, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), as demanding a "*determinate* criterion for drawing lines." App. 5 (emphasis added). The court remanded for EPA to articulate such a criterion. App. 12-13, 53. Subsequently, five of nine participating judges voted to grant en banc rehearing. App. 84. Because two active judges did not participate in the vote, however, the five fell short of constituting a majority of active judges of the circuit, and en banc rehearing was denied.

In addition, in a ruling directed expressly to ozone, the court called into question EPA's authority to implement the new eight-hour ozone NAAQS. App. 29-40. This

ruling was modified, but not withdrawn, on rehearing. App. 73-75.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A PUBLIC HEALTH ISSUE OF THE FOREMOST IMPORTANCE.

This Court has recognized that the 1970 Clean Air Act, which enacted the § 109(b)(1) mandate to set NAAQS that "protect the public health" with "an adequate margin of safety," responded to "threats to public health [that] were regarded as urgent." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Court has detailed the disappointing pre-1970 attempts at air pollution control that led Congress to this step. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (under the pre-1970 Act, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so;" the response of the States was "disappointing" and brought "little progress;" "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970," which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution.").

Three decades after Congress took this urgent step, the promise embodied in the 1970 legislation – "the promise that ambient air in all parts of the country shall have no adverse effects upon any American's health," 116 Cong. Rec. 42381/2 (December 18, 1970) (remarks of Senator Muskie, floor manager of the conference agreement)

– remains unrealized. Persistent unhealthy levels of PM and ozone are the most important reason for that continuing failure. No other pollutants come close to these in the number of deaths, illnesses, and other adverse effects caused.

For over ten years, the American Lung Association – and many other concerned organizations and individuals, including many scientists, physicians, and public health professionals – have worked to combat this problem by advocating the adoption of more protective NAAQS. As the record of this proceeding abundantly documents, the pre-existing NAAQS are simply not adequate to the task of protecting public health. At pollution levels allowed by those NAAQS, large numbers of people are dying, being driven to the hospital, and suffering pain and discomfort – all for the simple act of breathing the air.

Compared with their predecessors, the fine particle and ozone NAAQS remanded by the court of appeals represent a major step forward towards control of this pollution. Currently, many millions of people are exposed to harmful levels of pollution, yet live in areas where the pre-existing PM and ozone NAAQS are met. P. 5, *supra* (most studies finding adverse health effects were from eastern U.S., where PM concentrations meet the pre-existing NAAQS); 62 Fed. Reg. 38868/2, JA(O) 13 ("approximately 46 million more people, including approximately 13 million more children and 3 million more individuals with asthma, live in areas that would not attain a 0.08 ppm standard compared to a 0.09 ppm standard"); 61 Fed. Reg. 65725/2, JA(O) 51 (0.09 ppm standard is the

eight-hour level most equivalent to the pre-existing one-hour NAAQS).

EPA's new NAAQS will extend much-needed protection to these many people, as well as ensuring that clean-up activities in areas currently violating the pre-existing NAAQS will prevent more adverse health effects. The prospect is striking: the new NAAQS are expected to prevent thousands of deaths and hospital admissions each year, as well as tens of thousands of cases of respiratory illness and millions of days of missed work and restricted activity. Pp. 6, 12-13, *supra*.

The court of appeals decision will at best greatly delay and at worst outright prevent these public health benefits from being realized, and will condemn millions of Americans to continued exposure to harmful air pollution associated with premature death, hospital admissions, and other adverse health effects. To prevent this result, this Court should grant certiorari.

Moreover, the court of appeals' interpretation of the nondelegation doctrine threatens to sweep far beyond the specific regulations at issue here. Under the court's rationale, a "determinate criterion" may now be demanded for a variety of regulations, including regulations addressing topics other than health or the environment. To prevent this unwarranted expansion of nondelegation doctrine, the Court should grant certiorari.

II. THE COURT OF APPEALS' NONDELEGATION RULING CONFLICTS WITH PRIOR RULINGS OF THIS COURT, AS WELL AS OF AT LEAST ONE OTHER CIRCUIT.

The core of the court of appeals' nondelegation ruling is the assertion that a delegation must be limited by a "determinate criterion" in order to pass constitutional muster. App. 5. This assertion conflicts with the precedent of this Court, which requires only an "intelligible principle," not a determinate criterion – and which has upheld delegations under thoroughly non-determinate standards such as the "public interest." App. 54-55 (dissenting opinion of Judge Tatel cites cases). As Justice Scalia observed: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (agreeing with majority's conclusion that the Sentencing Reform Act set forth intelligible standards).

Under this caselaw, the specific standards in the Clean Air Act (App. 56-57 (Judge Tatel's dissenting opinion discusses standards prescribed by Clean Air Act §§ 108 and 109)) easily pass muster. Moreover, these standards are supplemented by legislative history providing additional guidance concerning congressional intent – *e.g.*, that NAAQS must protect sensitive individuals, must protect against adverse effects, and must be preventive. S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970); H. R. Rep. No. 294, 95th Cong., 1st Sess. 49-51 (1977). *See Lead Industries Assn. v. EPA*, 647 F.2d 1130, 1152, 1155 n.50 (D.C. Cir. 1980) (noting that legislative history of Clean Air Act

provides guidance concerning the congressional intent underlying § 109); *Mistretta*, 488 U.S. at 376 n.10 (legislative history and statutory text together "provide a factual background and statutory context that give content to the mandate of the Commission").

Moreover, the standard adopted by the plurality in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*") to avoid a possible nondelegation issue – "significant risk" – is likewise nondeterminate. As the plurality itself made clear, there is no formula for determining what risks are "significant." *Benzene*, 448 U.S. at 655-56 (significant risk standard "is not a mathematical straitjacket," and "cannot be based solely on a resolution of the facts," but "will be based largely on policy considerations;" the agency "is free to use conservative assumptions in interpreting the data," "risking error on the side of overprotection rather than underprotection").

Indeed, the court of appeals' nondelegation ruling conflicts even with the dissenting opinion of Justice Rehnquist, the lone vote in *Benzene* for a finding of excessive delegation. As Justice Rehnquist noted, it was the *feasibility* requirement in the Occupational Safety and Health Act that led him to that vote: "the insertion into § 6(b)(5) of the words 'to the extent feasible' rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation." *American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting, and explaining his vote in *Benzene*). By contrast, the bill as introduced contained no feasibility provision:

> Prior to the inclusion of the "feasibility" language, § 6(b)(5) simply required the Secretary to "set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health. . . ." Had that statute been enacted, it would undoubtedly support the result the Court reaches in these cases, and it would not have created an excessive delegation problem. The Secretary of Labor would quite clearly have been authorized to set exposure standards *without regard to any kind of cost-benefit analysis*.

Id. (emphasis added). The Clean Air Act, like the original OSHA bill that never became law, requires standards to be based on health "without regard to any kind of cost-benefit analysis." *See* App. 13. Accordingly, even under the strong version of the nondelegation doctrine espoused by Chief Justice Rehnquist, the Act would pass muster.

In addition to the conflict with this Court's nondelegation cases, the court of appeals' insistence on a determinate criterion conflicts with the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron* Step Two, which applies where Congress has "delegat[ed]" to an agency authority to interpret a statute, the reviewing court must uphold the agency interpretation if it is "reasonable." *Id.* 843-44. *Chevron* Step Two necessarily presupposes that Congress may lawfully write statutes that are ambiguous and therefore subject to differing interpretations – indeed, diametrically opposing ones. *Id.* 863 ("The fact that the agency has from time to time changed its interpretation

of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). Indeed, *Chevron* expressly acknowledged that it is proper for Congress to punt issues to agencies, rather than resolving them itself. *Id.* 865-66 (administrative agency can properly "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or *intentionally left to be resolved by the agency* charged with the administration of the statute") (emphasis added). In demanding a "determinate criterion," the court of appeals would take away Congress' rightful prerogative to delegate.

Finally, in addition to the conflicts with precedent of this Court, the court of appeals' decision conflicts with precedent of the First Circuit, upholding against nondelegation challenge a broad statutory delegation of authority to EPA to define "hazardous waste." *United States v. Henry*, 136 F.3d 12, 16-17 (1st Cir. 1998).

III. THE COURT OF APPEALS' RULING CONCERNING IMPLEMENTATION OF THE OZONE NAAQS PRESENTS AN IMPORTANT QUESTION THAT WAS ERRONEOUSLY DECIDED BELOW, AND SHOULD BE REVIEWED BY THIS COURT.

Once NAAQS are set, the Act requires that areas where air quality violates the NAAQS be designated as nonattainment areas, and that specified steps be taken to bring those areas into attainment. The Act prescribes generic provisions concerning nonattainment areas in Subpart 1 of Part D (§§ 171-179B, 42 U.S.C. §§ 7501-7509a), supplemented by pollutant-specific provisions in

Subparts 2-5 (§§ 181-192, 42 U.S.C. §§ 7511-7514a). The ozone-specific program in Subpart 2 (§§ 181-185B, 42 U.S.C. §§ 7511-7511f) is based on the pre-existing ozone NAAQS (which was set at 0.12 parts per million, averaged over one hour), App. 29-30, while Subpart 1 applies generically to any NAAQS (including any revised NAAQS). 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A).

The court of appeals correctly held that the ozone-specific program set forth in Subpart 2 does not preclude EPA either from promulgating a revised ozone NAAQS, or from issuing nonattainment area designations under that NAAQS. App. 31-34. The court incorrectly held, however, that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." App. 75. *See also* App. 31 ("EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2.").

A. The Court of Appeals' Subpart 2 Ruling Creates Uncertainty Concerning EPA's Authority to Implement the New Eight-Hour Ozone NAAQS.

The court of appeals' Subpart 2 ruling creates uncertainty concerning EPA's authority to implement the new eight-hour ozone NAAQS. That uncertainty is amply illustrated by statements of Judge Tatel, a member of the court of appeals panel that issued the ruling. Citing language in the court's opinion, Judge Tatel interpreted that

language to mean that areas meeting the pre-existing ozone NAAQS are "completely exempt from any ozone regulation whatsoever," App. 77 – even if they are violating the new eight-hour NAAQS.[4]

This reading of the court's opinion raises serious concerns for public health. Tens of millions of Americans live in areas with air pollution which – though meeting the pre-existing one-hour NAAQS – violates the new eight-hour NAAQS. *See* pp. 16-17, *supra*. It is crucial that these individuals enjoy the benefits of pollution control measures pursuant to the new eight-hour NAAQS. Moreover, millions of Americans live in areas that currently violate the pre-existing one-hour NAAQS. 40 C.F.R. Part 81 (listing areas where one-hour NAAQS is violated, including Los Angeles, Houston, Chicago, Washington, D.C., Baltimore, Philadelphia and New York, among others). In such areas, it is crucial that pollution control programs reduce ozone pollution sufficiently to meet the new eight-hour standard – and that these areas not be held exempt from further pollution reductions once they attain the one-hour standard.

Despite Judge Tatel's concerns about the implications of the court of appeals' decision, he nonetheless joined in the court's disposition of this issue, because he concluded that the court's decision (as amended upon rehearing) "*leaves open the possibility* that the new ozone standard can be implemented in areas that have attained the old standard." App. 81 (emphasis added). ALA also believes that

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[4] The language cited by Judge Tatel was not altered on rehearing.

the better reading of the court of appeals' amended decision is that it leaves open this possibility. But because the new ozone NAAQS is a crucial regulation affecting areas inhabited by tens of millions, pp. 16-17, *supra* (tens of millions of Americans live in areas with air quality that meets the pre-existing one-hour NAAQS but violates the new eight-hour NAAQS), this question should not be left to "possibilit[ies]." Rather, the Court should review this issue, and ensure that implementation of the new NAAQS does not become mired in litigation that further delays – and possibly prevents – achievement of the healthy air quality that Congress mandated three decades ago.

B. The Court of Appeals' Subpart 2 Ruling Is Erroneous.

The court of appeals' holding that the classifications, attainment dates, and control measures of Subpart 2 apply to the new eight-hour NAAQS contravenes the Act. By their express terms, the classification provisions of Subpart 1 apply to "*any* revised standard, *including a revision of any standard in effect on November 15, 1990*," § 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A) (emphasis added), and the attainment date provisions track that applicability. *Id.* (providing that classification under § 172(a)(1) is *inter alia* "for the purpose of applying an attainment date pursuant to paragraph (2)" – *i.e.*, pursuant to § 172(a)(2)).

The court of appeals concluded that these Subpart 1 provisions were ousted by §§ 172(a)(1)(C) and (a)(2)(D),

which provide that the § 172(a) classifications and attainment dates do not apply to nonattainment areas for which classifications and attainment dates "are specifically provided under other provisions of this part." The court found that these ouster provisions apply to the new eight-hour NAAQS, basing this finding on the court's conclusion that § 181(a)(1) provides classifications and attainment dates for all ozone nonattainment areas. App. 34-35.

This conclusion is erroneous. By its terms, § 181(a)(1) contains no classifications or attainment dates for any area with an ozone "design value" less than 0.121 – a level roughly approximating the level of the pre-existing one-hour NAAQS. App. 29-30. Thus, § 181(a)(1) offers no classifications or attainment dates for the numerous areas where air quality meets the pre-existing one-hour NAAQS, yet violates the new eight-hour NAAQS.

For areas with design values greater than or equal to 0.121, § 181(a)(1) provides classifications and attainment dates – but only for the pre-existing one-hour NAAQS, not for the new eight-hour NAAQS. Applying the § 181(a)(1) classifications and attainment dates to the new eight-hour NAAQS would produce absurd results – specifically, many areas would be assigned attainment dates *before the July 1997 promulgation of the new NAAQS*. For example, areas classified as marginal under the new NAAQS would be required to attain by November 15, 1993, and areas classified as moderate would be required to attain by November 15, 1996. 181(a)(1) (table 1). A reading that results in an attainment date for a NAAQS that antedates the very existence of that NAAQS cannot possibly be a valid interpretation of the Act.

Finally, the court of appeals erred by ruling (App. 31) that the new eight-hour NAAQS must be enforced only in accordance with the "control measures" of Subpart 2. Indeed, the court did not even point to a statutory provision that allegedly ousted the Subpart 1 provisions concerning control measures.

No such provision exists: § 172(b), which requires states to submit pollution control plans implementing new NAAQS no later than "3 years from the date of the nonattainment designation," contains no ouster provision comparable to § 172(a)(1)(C) or (a)(2)(D). Nor is such an ouster provision contained in § 172(c), which sets forth nine specific requirements that a control plan must meet – including the requirement that the plan "provide for attainment of the national primary ambient air quality standards." § 172(c)(1).

In short, the court of appeals' ruling is erroneous, and raises questions concerning EPA's authority to implement the new NAAQS. Given the importance of that NAAQS to reducing pollution exposures in areas where tens of millions of Americans live, this Court should grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: January 27, 2000.

Respectfully submitted,

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Nos. 99-1257, 99-1263, 99-1266

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR THE RESPONDENTS APPALACHIAN POWER CO., *et al.*

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency ("EPA" or "the Agency") revised National Ambient Air Quality Standards ("NAAQS") promulgated under Section 109 of the Clean Air Act, 42 U.S.C. § 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act which resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation under "Subpart 1" of the Clean Air Act.

3. Whether this Court should grant certiorari to review the D.C. Circuit's unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of ozone NAAQS.

PARTIES TO THE PROCEEDINGS

1. CAA Industry Respondents are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari: *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases).

   Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)

   American Forest & Paper Association

   American Iron & Steel Institute

   American Petroleum Institute

   American Public Power Association

   Appalachian Power Co., *et al.* is comprised of the following:

      Baltimore Gas and Electric Company

      Carolina Power & Light Company

      Central and South West Services, Inc.

         Central Power and Light Company

         Public Service Company of Oklahoma

         Southwestern Electric Power Company

         West Texas Utilities Company

      Central Illinois Public Service Company

      CINergy Corp.

      Columbus Southern Power Company

      Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)

Consumers Energy Company
Dayton Power and Light Company, The
Detroit Edison Company, The
Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company,
dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation
dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission

Cooperative, Inc.
Potomac Edison Company, The
dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
and
Edison Electric Institute
National Rural Electric Cooperative Association
Chemical Manufacturers Association
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
(petitioned as National Petroleum Refiners Association in the case below)
Nevada Mining Association
Newmont Gold Co.

Phoenix Cement Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties are petitioners in one or both of the two consolidated cases addressed by this brief in response, but have not joined CAA Industry Respondents in filing this brief in response.

American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Judy's Bakery, Inc.
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
David Matusow
Brian McCarthy
National Association of Manufacturers

National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Small Business United
National Stone Association
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Petitioner United States Environmental Protection Agency was the respondent in all of the proceedings below.

4. The following parties were intervenors in one or both of the two consolidated cases addressed by this brief in response.

American Lung Association
American Road and Transportation Builders Association
Atlantic City Electric Company
Commonwealth of Massachusetts
State of New Jersey

5. The following parties appeared as *amici curiae* in one or both of the two consolidated cases addressed by this brief in response.

Representative Tom Bliley

Senator Orrin G. Hatch
State of Connecticut
State of New Hampshire
State of New York
State of Vermont

RULE 29.6 DISCLOSURE STATEMENT

1. The following list of CAA Industry Respondents hereby discloses the parent companies of respondents and any publicly held companies that own 10% or more of respondents' stock.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)
Georgia Power Company

(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Illinova Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)
South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest

Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co. (a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following CAA Industry Respondents have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these respondents.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Carolina Power & Light Co.
CINergy Corp.
Chemical Manufacturers Association
Conectiv
Detroit Edison Co.
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.

Jacksonville Electric Authority
Kansas City Power & Light Co.
LGE Energy Corp.
Madison Gas and Electric Co.
Meridian Gold Co.
Minnesota Power
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
Nevada Mining Association
Newmont Gold Co
Oglethorpe Power Corp.
Ohio Valley Elec. Corp.
Ottertail Power Co.
PacifiCorp
PP&L Electric Utilities Corporation
dba PPL Utilities
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

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BRIEF IN RESPONSE TO PETITIONS FOR CERTIORARI

On May 14, 1999, the United States Court of Appeals for the District of Columbia Circuit remanded to the United States Environmental Protection Agency ("EPA" or "the Agency") the Agency's revised National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM"). EPA has petitioned for a writ of certiorari (No. 99-1257) on parts of that decision, as confirmed and clarified upon rehearing on October 29, 1999. The American Lung Association ("ALA") (No. 99-1265) and the states of Massachusetts and New Jersey ("State Petitioners") (No. 99-1263) have filed petitions seeking review of the same issues. This response is being filed on behalf of trade associations representing most of the major industries in this country, including the utility industry, automobile industry, coal industry, mining industry, oil industry, iron and steel industry, chemical industry, paper industry, paint and coating industry and home building industry; over 50 individual companies; and other organizations (hereinafter referred to as "CAA Industry Respondents"). These companies and organizations are listed on the cover to this brief.

This Court should deny these petitions as to the lower court's holding on Subpart 2 to Part D of Title I of the Clean Air Act ("CAA"). As to the questions Petitioners present regarding the "nondelegation" holding, if certiorari is granted, it must encompass review of the lower court's

decision limiting the factors that may be considered by EPA on remand in developing an "intelligible principle."[1]

STATEMENT OF THE CASE

1. *The NAAQS Program* – Section 108(a), EPA App. 109a-110a, provides for regulation of an ambient air pollutant that "endangers" public health. Under §§ 108 and 109 of the Act, EPA App. 109a-113a, NAAQS are to be based on a "criteria document," that "accurately reflects the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare" associated with the presence of a pollutant in the ambient air. Under § 109(b), State App. 102, "primary" NAAQS are set at a level that, allowing an "adequate margin of safety," is "requisite to protect the public health." Secondary standards are set at a level that is "requisite to protect the public welfare from known or anticipated adverse effects." Under § 109(d), State App. 102, NAAQS may be revised periodically "as may be appropriate" in accordance with § 108 and § 109(b).

2. *The EPA Rulemaking* – In the case below, CAA Industry Respondents challenged EPA's decision to establish new "public health" policy under § 108 and § 109 of the Clean Air Act as reflected in its decision (1) to revise the existing NAAQS for ozone and PM, and (2) to replace the ozone reduction program enacted by Congress in 1990 based on the 1-hour NAAQS (the "Subpart 2" program, CAA Industry Cross-Petitioners App. ("ICP App.") 2a-62a) with a

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[1] Out of an excess of caution, a Conditional Cross-Petition for Certiorari addressing this issue is being filed today. The companies and organizations joining in that Cross-Petition ("CAA Industry Cross-Petitioners") are listed on the cover of that petition.

different program to be developed by EPA under the general planning requirements of Subpart 1 of the Act and based on a new 8-hour ozone NAAQS.

While EPA and other petitioners claim these standards are needed to address serious health risks, the record below presents a very different picture. With respect to the ozone NAAQS, EPA's independent science advisers (the Clean Air Scientific Advisory Committee or "CASAC")[2] concluded, based on their extensive review of the science, that none of the ozone levels that were considered for the revised NAAQS (including the existing ozone NAAQS) could be distinguished as significantly more protective of public health than the others.[3] EPA's staff similarly observed that a standard equivalent to the existing 1-hour NAAQS "would reduce estimated exposure of the at-risk population sufficiently to provide some margin of safety."[4]

As for PM, the same independent science advisers could form *no* consensus on the level, averaging time or form of a revised PM NAAQS because of many uncertainties regarding the existence and nature of any causal relationship between public health, on the one hand, and the fine particle indicator

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[2] CASAC is the independent body created by Congress to provide scientific advice to EPA on NAAQS decisions. *See* CAA § 109(d)(2), EPA App. 112a.

[3] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236, ("[T]he Panel concluded that there is no 'bright' which distinguishes any of the proposed standards . . . as being significantly more protective of public health.").

[4] EPA, Review of the National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information 167 (1996) ("Staff Paper"), Ozone JA 1790.

("$PM_{2.5}$") chosen for the revised NAAQS, on the other.[5] Given these uncertainties and the lack of air quality data for $PM_{2.5}$, the Administration delayed implementation of the $PM_{2.5}$ NAAQS until at least 2002 so that the revised standard could be reevaluated.[6]

The uncertain science regarding possible health effects associated with exposure to extremely low ambient concentrations of these substances,[7] coupled with EPA's assumption that there is no threshold for effects for these substances, made it impossible to distinguish among the range of alternative standard levels based on public health protection alone.[8] EPA's decisions to revise these NAAQS

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[5] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (June 13, 1996), PMJA 3167 ("The diversity of opinion . . . reflects the many unanswered questions and uncertainties associated with establishing causality of the association between $PM_{2.5}$ and mortality."); *see also* 62 Fed. Reg. 38,689 n.90 (suggesting a lack of direct evidence of a relationship between long-term $PM_{2.5}$ exposure and health effects).

[6] The President, Memorandum of July 16, 1997, "Implementation of Revised Air Quality Standards for Ozone and Particulate Matter," 62 Fed. Reg. 38,421 (1997), ICP App. 72a. This decision was codified by Congress. *See* Transportation Equity Act for the 21st Century § 6101, Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a.

[7] In the case of ozone, for example, EPA's science advisers observed that the revised standard would regulate concentrations approaching background levels. CASAC Tr. (March 22, 1995) at 296, Ozone JA 278; Comments by George T. Wolff (March 27, 1995), at 4, Ozone JA 383; Staff Paper at 20, Ozone JA 1830.

[8] *See, e.g.*, 62 Fed. Reg. 38,883 (ozone); 62 Fed. Reg. 38,688 (PM) (the Administrator's margin of safety determinations "are largely judgmental in nature, particularly with respect to nonthreshold pollutants, and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric.").

therefore were driven not by science, but by the Administrator's policy judgment, unbounded by any intelligible principle, as to how much protection is "sufficient[]" in light of "[u]ncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified."[9] Furthermore, these policy judgments were exercised against a background of declining pollutant concentrations due to CAA programs already in place.[10]

In exercising this policy judgment, EPA explained at length factors that it asserted were *not* relevant to its decision[11] and then identified several health-related factors that it did consider.[12] EPA wholly failed, however, to articulate any principle that would guide the exercise of its discretion in

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[9] 62 Fed. Reg., 38,857, (ozone); 62 Fed. Reg. 38,653 (PM).

[10] *See, e.g.*, EPA, *National Air Quality and Emissions Trends Report, 1995* at 1, 61 (1996), PMJA 4152-53 (ambient PM_{10} concentrations decreased by 22 percent between 1988 and 1995 and the number of areas designated nonattainment for ozone decreased by 30% between 1990 and 1996).

[11] These factors included the cost and technological feasibility of controls, the disruptive impact of replacing the congressional ozone reduction program with a new program to be devised by EPA, and the public health "disbenefits" of more restrictive standards. 62 Fed. Reg. 38,878-83, 38,884-85 (ozone); 62 Fed Reg. 38,683-89 (PM); *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* 128-33 (July 1997), Ozone JA 210-15; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* 112 (July, 1997), PMJA 312.

[12] The factors that EPA did consider included the magnitude and severity of health effects, uncertainty in the data, and the size of the sensitive population. EPA Pet. 15 n.9, EPA App. 7a.

choosing, based on these health-related factors, from among air quality levels that could not be distinguished from a public health protection standpoint. It simply asserted that where there is scientific uncertainty, the courts must defer to the Administrator's "reasoned" judgment even if the Agency articulates no principle for assessing whether the resulting standard is reasonable.[13]

As a result, the revised NAAQS reflected EPA's interpretation of § 109 to provide no intelligible criteria to guide the Administrator's risk management decisions. Following this theory, the Administrator's discretion in choosing among health protective alternatives was unconstrained, for example, by EPA's own analyses showing that the costs to society of the revised ozone NAAQS would significantly outweigh its benefits.[14]

Finally, as a result of the failure of the pre-1990 Clean Air Act program to reduce ozone under the general planning authority of Subpart 1 of Part D, Title I of the Act, Congress in 1990 enacted a detailed statutory program as Subpart 2 to Part D. This new statutory ozone reduction program was based on the existing 1-hour NAAQS and reflected Congress' judgment that addressing the public health risks associated with low-level ozone exposures does not require inflexible attainment deadlines or massive economic or social

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[13] *See, e.g.*, 62 Fed. Reg. 38,883, (ozone); 62 Fed. Reg. 38,688 (PM).

[14] *See* EPA, *Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, ES-17, ES-20 (July 16, 1997), Ozone JA 2919, 2924, 2927 ("RIA"). In the case of the revised PM NAAQS, EPA estimated the cost of attainment at $37 billion annually. *Id.* at 9-1, Ozone JA 2934.

dislocation – aspects of the pre-1990 Subpart 1 ozone reduction program that made that program unworkable.[15]

The statutory Subpart 2 program includes specific strategies and timetables, based on the existing 1-hour ozone NAAQS, for reducing ground-level ozone concentrations. It applies to both nonattainment and attainment areas.[16] And it explains how to regulate areas that are now in attainment but that may have deteriorating air quality and become nonattainment areas in the future.[17]

To avoid any confusion about how ozone reductions were to be achieved under the Clean Air Act, Congress provided in § 181(a) of Subpart 2 that "each area designated nonattainment for ozone pursuant to § 107(d)" – a provision that governs designation of *all* existing and future ozone nonattainment areas as a prerequisite for regulating that area under the Act – "shall be classified at the time of such designation, under table 1, *by operation of law*" and then regulated according to its Subpart 2 classification. CAA § 181(a), EPA App. 117a (emphasis added). In this way Congress blocked EPA from initiating an alternative ozone reduction program under Subpart 1 based on a more stringent ozone NAAQS.

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[15] *See* 1 Sen. Comm. on Env. & Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990*, 1236-37 (Comm. Print, 1993) ("1990 Legis. Hist."), (H.R. Debate Oct. 26, 1990, statement of Rep. Fields); H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. at 3169-72, 3253-82.

[16] *See, e.g.*, CAA § 184(b), ICP App. 55a-56a (requiring specific implementation measures in attainment areas of states within an ozone transport region).

[17] *See* CAA § 181(b)(1), EPA App. 119a-120a.

Despite this clear statutory language, EPA in its final rule revising the ozone NAAQS promulgated a provision (40 C.F.R. § 50.9(b), State App. 113) authorizing EPA to revoke the congressional Subpart 2 program for areas that have air quality meeting the 1-hour NAAQS. The provision requires EPA to replace the Subpart 2, 1-hour NAAQS-based regulatory program in these areas with a program that EPA would develop for the revised 8-hour NAAQS under the general planning requirements of Subpart 1,[18] the approach Congress *rejected* in adopting Subpart 2. Pursuant to that provision, EPA subsequently revoked the 1-hour NAAQS and Subpart 2 program in a number of areas.[19]

3. *The Lower Court's Opinion* -- Because of the various flaws in EPA's reasoning summarized above, on May 14, 1999, a panel of the D.C. Circuit remanded the revised NAAQS for ozone and PM to EPA. First, after a thorough review of the record, the panel concluded that, because the Administrator's interpretation of § 109 failed to provide *any* intelligible principle for exercising public health policy judgment in response to uncertain and inconclusive science (i.e., because her interpretation of § 109 "[f]ail[ed] to state intelligibly how much [risk] is too much"), the Administrator's interpretation would render this provision an unconstitutional delegation of authority. EPA App. 5a-6a. The court did *not* hold the statute itself unconstitutional but rather remanded the NAAQS for EPA to exercise the discretion delegated to it by Congress to interpret § 109 in a

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[18] 62 Fed. Reg. 38,873, ICP App. 74a-75a.

[19] *See, e.g.*, 64 Fed. Reg. 30,911 (1999); 63 Fed. Reg. 31,014 (1998); 63 Fed. Reg. 39,432 (1998).

way that provides intelligible criteria for implementing it. EPA App. 14a.

Second, the court rejected EPA's interpretation of the CAA as prohibiting consideration of the protective effect of ozone in the ambient air with respect to ultraviolet B ("UVB") radiation when it establishes an ozone NAAQS. According to the court, "it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects."[20] EPA does not seek review of this part of the lower court's decision.

Third, the panel rejected EPA's legal conclusion, embodied in § 50.9(b) of the rule, State App. 113, that EPA had authority to rewrite the congressional ozone reduction program. The court relied on the plain language of the statute directing that the congressional Subpart 2 program apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the CAA – explicit language that the court found dispositive under the first prong of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA App. 38a. On this basis, the court held that EPA could enforce a revised ozone NAAQS only "under Subpart 2," EPA App. 43a, and that the Agency was precluded "from requiring areas to comply either more quickly *or with a more stringent NAAQS*." EPA App. 40a (emphasis added).[21]

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[20] EPA App. 47a. Respondents also raised the public health disbenefits issue as to the revised PM NAAQS and EPA rejected those comments on the same grounds that it relied upon in refusing to consider the issue in the ozone rulemaking.

[21] In another part of its opinion that has gone unchallenged, the panel vacated the revised coarse PM standards. EPA App. 53a, 57a-58a.

On October 29, 1999, the D.C. Circuit panel rejected EPA's petition for rehearing, except for minor editing which, *inter alia*, clarified and confirmed that portion of the panel's decision concerning the role of Subpart 2 in implementation of any revised primary ozone NAAQS.[22] The D.C. Circuit then *unanimously* rejected EPA's *en banc* petition on the public health disbenefits and Subpart 2 issues of statutory construction, both of which were independent grounds for remanding the revised ozone standard.[23]

EPA's petition for certiorari followed.

REASONS FOR REJECTING THE "NON-DELEGATION" QUESTION PRESENTED BY EPA AND FOR DENYING THE PETITIONS FOR CERTIORARI ON THE SUBPART 2 HOLDING

I. THE "NONDELEGATION" QUESTION PRESENTED BY EPA, ALA AND STATE PETITIONERS DOES NOT WARRANT REVIEW.

After careful review of a complex record, the court below concluded that EPA had not applied any "intelligible principle" in deciding whether and how to revise the ozone and PM NAAQS. It therefore remanded the cases to allow EPA to identify such a principle.

While the D.C. Circuit correctly held that EPA's interpretation of the Act requires remand to develop an "intelligible principle" to manage risk, EPA App. 14a, it

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[22] EPA App. 70a-82a.

[23] Those judges who dissented from the court's denial of rehearing *en banc* mentioned only the nondelegation issue. *See* EPA App. 91a-99a.

erred in precluding EPA from considering other burdens on society, including the economic and indirect public health consequences of NAAQS decisions, as part of the "intelligible principles" for risk management decisions under § 109. EPA App. 19a-22a. As explained in the Conditional Cross-Petition also being filed in this case, the "adequate margin of safety" language in § 109(b), EPA App. 111a, the "as may be appropriate" language in § 109(d), EPA App. 112a, and the "purposes" section of the Act, ICP App. 1a, permit the Agency to consider the broad economic and social consequences of CAA § 109 risk management decisions.

As a result, although CAA Industry Respondents disagree that the nondelegation question presented by the Government and others makes this case worthy of review by this Court, they believe that if this Court reviews the "nondelegation" holding of the lower court, it must review the scope of EPA's discretion to manage risk under § 109 of the Act.

A. The Question Presented by EPA and Other Petitioners Presents No Conflict With Supreme Court Precedent or With Any Important Principle of Law.

To read the question presented and the arguments of the Government and other petitioners, one would think that the D.C. Circuit had struck down an act of Congress and held that Congress may no longer legislate in broad terms. But that is not what the court of appeals did. All it did was to hold that *EPA's construction* of a statute is inadequate until EPA reveals its principle of decision, and then it remanded the rules to EPA to articulate such a principle. EPA App. 5a, 14a. This by itself is unexceptional, and no "compelling reason[]" for Supreme Court review. Sup. Ct. R. 10.

Indeed, the court could not have done less, faced with EPA's radical view of its own authority. EPA argues that to issue a legally valid decision it need only consider factors it deems relevant. This, EPA explains, is satisfied merely by EPA's discussion of relevant evidence in the *Federal Register*. EPA Pet. 13-14. After that, all is "judgment." In other words, EPA can decide whatever it wants, so long as it has examined an appropriate set of data. Just as the National Environmental Policy Act is "essentially procedural,"[24] EPA hopes to make its own rulemaking obligation under § 109 of the Clean Air Act "essentially procedural."

This is EPA's position, but it is not the law of agency rulemaking and never has been. EPA's view of its role imposes no *substantive* standard on agency rulemaking at all, only the *procedural* requirement that relevant evidence be considered in a decisional vacuum. As this novel theory suggests, agency "judgment" becomes a mysterious process that cannot ultimately be explained but must issue oracle-like from the agency's mouth. "Pay no attention to that man behind the curtain," says the Agency; "I have considered the relevant evidence."

We repeat: All the court required here was that the agency explain its reasoning. Some have argued that the constitutional "nondelegation" rationale for remand in this case might as well have been articulated as "arbitrary and capricious" agency action[25] – that EPA failed to state a

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[24] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

[25] Craig Oren, "Run Over by *American Trucking* Part I: Can EPA Revive its Air Quality Standards?", 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,653, 10,658 (Nov. 1999).

rational basis for its decision.[26] Whatever the rationale, the proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review.

In support of its petition, EPA observes that "Congress does not violate the constitution 'merely because it legislates in broad terms.'" EPA Pet. 12. But from this uncontroversial principle, EPA goes on to argue that because Congress wrote § 109 in broad terms, EPA actions implementing § 109 must be upheld – even if EPA interprets § 109 to provide no criteria to guide its discretion. EPA Pet. 11-12. According to EPA, to rule otherwise would be a "striking departure from this Court's nondelegation jurisprudence." EPA Pet. 11.

Not at all. In an attempt to manufacture a basis for certiorari, EPA attacks a strawman. The lower court did *not* question Congress' authority to legislate in broad terms, and neither do we. Nor did the court hold that § 109 is unconstitutional. Rather, in response to EPA's repeated and strenuous rejections of any reading of § 109 that would provide principles to guide the Agency's choice among alternative standards, the lower court found that EPA's *interpretation* of § 109 – not the statute on its face – reflects an unconstitutional delegation. The court therefore remanded the rules before it to permit the Agency to exercise the discretion given it by Congress in § 109 to interpret and to implement this broad delegation of authority.[27]

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[26] *See* CAA § 307(d)(9), EPA App. 126a ("arbitrary and capricious" standard).

[27] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 865 (1984) (Where "Congress has not directly addressed

There is nothing remarkable about this. Courts have frequently required an agency to articulate the legal principles that guide its discretion when it adopts, or refuses to revise, legislative rules.[28] Indeed, we are aware of no decision, by this Court or any other, that has permitted an agency to construe its enabling statute so that no intelligible principle governs the agency's exercise of rulemaking discretion.

This Court has always demanded that agencies be guided by an intelligible principle, as even Petitioner ALA concedes.[29] *See Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), the Court found that the agency had provided no intelligible principle for setting standards under § 6(b)(5) of the Occupational Safety and Health Act ("OSHA"). The Court nevertheless found that an intelligible principle could be discerned when this provision was read along with the definitions in the Act (OSHA § 3(8)) and

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the precise question at issue," it is for the agency to construe the statute "within the limits of [the congressional] delegation.").

[28] *See infra* notes 33 - 35 and accompanying text.

[29] *See* ALA Pet. 18 (ALA concedes that "the precedent of this Court . . . requires . . . an 'intelligible principle'" to guide statutory implementation, but argues that the lower court in its explanation of this established principle demands too much precision from EPA).

therefore remanded the case. *Id.* at 641.[30] Curiously, EPA in its petition does not even mention *Industrial Union.* Nor does EPA discuss the other key case on which the lower court relied *(International Union, UAW v. OSHA)*[31] – a case in which the Government did not even seek certiorari.[32]

Therefore, while EPA argues that the lower court has questioned Congress' authority to legislate "in broad terms," it did nothing of the kind. It simply confirmed that when EPA acts pursuant to a broad delegation of authority, EPA's first and most critical obligation is to enunciate, under the second prong of *Chevron,* the legal standard it applies in exercising the discretion given it by Congress. Where an agency misconstrues the scope of the discretion delegated by Congress, it acts unlawfully.[33]

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[30] Petitioner ALA's reliance on this case, *see* ALA Pet. 19, is misplaced, because this case adopts the same method of analysis as applied by the lower court in *ATA*.

[31] 938 F.2d 1310 (D.C. Cir. 1991).

[32] By contrast, petitioners cite a number of cases, including *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), *U.S. v. Henry*, 136 F.3d 12, 17 (1st Cir. 1998), and *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974), in which statutes delegating broad authority were found constitutional because the language of the statute, its purposes, its factual background and context bounded administrative discretion. Similarly, in this case, the court below did *not* find the CAA unconstitutional; it simply remanded this case for EPA to exercise the discretion delegated to it by Congress. *Cf. South Terminal Corp.* 504 F.2d at 670 (The court set aside a key provision of the rule at issue as "standardless").

[33] *See, e.g., SEC v. Chenery*, 332 U.S. 194, 196-97 (1947); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970); *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).

Reflecting these established principles, judicial decisions commonly set aside agency orders because the agency failed to apply the correct legal standard when it promulgated a rule or took some other action.[34] Similarly, where an agency construes a statute to provide *no legal standard at all* to constrain its discretion, the courts have rejected such a construction because of the "nondelegation" principle.[35] Remanding the case for EPA to develop an intelligible principle for risk management decisions is therefore fully in keeping with the law of this Court.[36]

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[34] For example, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), Congress authorized the agency to define "area of production" in geographic terms, leading the Court to disapprove a regulation dependent on the number of workers involved instead. *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1055 (D.C. Cir. 1995); *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994); *Alabama Power Co. v. Costle*, 636 F.2d 323, 355 (D.C. Cir. 1980).

[35] *See, e.g., National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342-43 (1974); *International Union, UAW v. OSHA*, 938 F.2d 1310, 1313; *see also AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734-35 (1999).

[36] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. at 646 (plurality opinion) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. at 342 ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *see also Loving v. United States*, 517 U.S. 748, 758

EPA should not have been surprised by this remand, for it had ample warning in the case law of the lower court. In an earlier case addressing NAAQS, the D.C. Circuit anticipated that in future cases "EPA might be required to explain the risk it considered tolerable." *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 974 (1990). Just such a case arose in *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 58 (1999), resulting in a remand for EPA to explain how it determined what risk was tolerable.[37] This is not an unreasonable demand when the statute requires the Agency to explain why "public health" will be advanced by its decision.[38] Without a legal standard ("intelligible principle") to guide its exercise of discretion, judicial review – including arbitrary and capricious review – simply is not possible.[39]

(1996) ("[T]he lawmaking function belongs to Congress, . . . and may not be conveyed to another branch or entity.").

[37] 134 F.3d at 392-93 ("[U]nless [the Administrator] describes *the standard under which she has arrived at this conclusion*, supported by a '[]plausible' explanation, . . . we have no basis for exercising our responsibility to determine whether her decision is 'arbitrary [or] capricious. . . .'" (emphasis added; citation omitted)).

[38] As the late Senator Chafee observed after the lower court's decision, "this is not a general defect in all of our environmental laws . . . . I agree with the Court as it expresses its discomfort with the vagueness in these two regulations." Statement of Hon. John H. Chafee, Chairman, Senate Environment Committee, Hearings on Clean Air Act (May 20, 1999).

[39] Contrary to EPA's argument, EPA Pet. 17-19, the lower court does *not* call for an unprecedented amount of precision in making NAAQS decisions. Rather, by requiring the Agency to enunciate an "intelligible principle" guiding its risk management decisions under § 109, the court is merely seeking consistency in decisionmaking, without which agency action would be arbitrary by definition.

Finally, EPA points in its petition to statutory language and legislative history which it believes could be used to derive intelligible principles for making risk management decisions under § 109. For example, EPA argues in its petition that an intelligible principle might be found, among other places, in (1) the Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," EPA Pet. 15; and (2) the legislative history's direction to consider the "public health" and not "individual health." *Id.*[40]

While EPA's suggestions represent a good starting point for developing an intelligible principle for risk management, they are only a starting point. None of the language EPA identifies itself specifies how to select among a range of uncertain health risks, or among air quality levels that cannot be distinguished from a public health protection standpoint. Rather, this is the task the lower court has directed EPA to undertake on remand, and EPA's petition suggests that the Agency knows what this task entails.

For these reasons, the "nondelegation" question presented in the petitions for certiorari reveals no conflict with any prior precedent of this Court and no important issue of law. Certiorari on this question is not appropriate.

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[40] In its petition for rehearing to the lower court, EPA also argued that an intelligible principle might be found in the "requisite to protect" language of § 109 – namely, that this language requires a standard level no more or less stringent than "necessary" to protect public health. In its petition, EPA also advances for the first time use of a "zone of reasonableness" test. *See* EPA Pet. 18.

B. If Certiorari Is Granted, It Should Be Granted to Address the Scope of EPA's Authority on Remand To Define an Intelligible Principle.

For the reasons set out above, CAA Industry Respondents submit that the nondelegation issue raised by the Government does not offer a compelling reason for certiorari. Should this Court nevertheless grant certiorari on the need for an intelligible principle to guide § 109 risk management decisions, the Court will have to consider the scope of EPA's discretion to derive an intelligible principle from the CAA.

On this issue, the lower court was presented with arguments that neither the "margin of safety" standard-setting language of § 109 nor the "as may be appropriate" standard-revision language of § 109(d) prevents EPA from considering social or economic values or the indirect public health consequences of its decisions on NAAQS. The court of appeals emphatically rejected these arguments under "*Chevron* step one," on the ground that its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), held that the "'[s]tatute . . . make[s] clear that economic considerations play no part in the promulgation of [NAAQS].'" EPA App. 19a.

However, this characterization of *Lead Industries* is at odds with the lower court's later decision interpreting similar language in CAA § 112, as it then existed, requiring regulation of hazardous air pollutants to provide an "ample margin of safety." *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*). Although this language is more precautionary than the "adequate margin of safety" in CAA § 109, writing for the court, Judge Bork observed that the "margin of safety" language on its face "does *not* . . . preclude consideration of any factor," *id.*

at 1155 (emphasis added), and that *Lead Industries* and prior D.C. Circuit case law addressing § 109 does not stand for the proposition that "cost and technological feasibility can *never* be considered under the Clean Air Act unless Congress expressly so provides." *Id.* at 1157 (emphasis added).

If the Court decides to grant certiorari in response to the Government's nondelegation issue, we believe that the Court will necessarily have to address the scope of EPA's authority on remand to define intelligible principles for risk management decisions. Nevertheless, "out of excess of caution,"[41] CAA Industry Cross-Petitioners are filing a Conditional Cross-Petition presenting this question directly. CAA Industry Cross-Petitioners believe that this question is worthy of review and therefore would not object to a grant of certiorari to address the question as framed in the Conditional Cross-Petition.

II. THE COURT OF APPEALS' "SUBPART 2" HOLDING DOES NOT WARRANT CERTIORARI.

The petitions for certiorari also address the court of appeals holding that any revised NAAQS for ozone may be enforced only in conformity with Subpart 2 of Part D of the CAA rather than (as EPA alleges) under Subpart 1 as well. EPA App. 81a. In support of its petition, EPA first asserts that certiorari is needed to address an argument that EPA briefed for the first time in its petition for rehearing to the panel, namely, that the lower court lacked jurisdiction to review EPA's decision on this point. EPA Pet. 19-25. Alternatively,

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[41] *See, e.g., Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239 (1935).

EPA repeats the merits arguments that were rejected by the panel in its initial decision and again on rehearing, and which did not garner a single vote for rehearing *en banc*. EPA Pet. 25-29. Neither argument has merit, and neither provides a basis for certiorari.

A. The Government's Belated Finality and Ripeness Arguments Present Neither A Conflict of Law Nor an Issue of Importance.

CAA Industry Respondents challenged EPA's final rule revising the ozone NAAQS on the ground that, because the congressional Subpart 2 program is based on the existing 1-hour NAAQS and because this program applies "by operation of law" under CAA Section 181(a), EPA App. 117a-119a, to "[e]ach area designated nonattainment for ozone" under CAA § 107(d), it was not "appropriate" to replace the 1-hour NAAQS with a new more stringent 8-hour NAAQS that addressed the same public health risks, and that could not be implemented or enforced under Subpart 2. *See* EPA App. 35a.[42]

The lower court rejected the argument that revision of the ozone NAAQS was not "appropriate" on this ground. The court nonetheless accepted Industry Respondents' underlying argument that implementing a more stringent ozone NAAQS would conflict with the Subpart 2 statutory program that Congress established as the exclusive program for

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[42] Members of CASAC in fact recommended against an approach that would require simultaneous application of different ozone standards in different areas of the country, because of the confusion and disruption this would cause. *See, e.g.*, Letter from James H. Price to Thomas O. Miller (April 24, 1995), Ozone JA 388.

implementing the ozone NAAQS: "[a]s the petitioners argue," Subpart 2 of the 1990 Amendments "preclude[s] the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a (emphasis added).

EPA argues in its petition for certiorari that the "only issue before the court of appeals . . . was whether the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. 21. But this was clearly not the case, as State Petitioners recognize.[43] Indeed, the very first issue raised in CAA Industry Respondents' brief below was: "Whether EPA is authorized to substitute its policy judgment for that of Congress by replacing the statutory ozone reduction program designed specifically to implement the 1-hour NAAQS with a new program to implement a different NAAQS?" Furthermore, as the lower court's decision shows, CAA Industry Respondents specifically briefed and argued the issue of EPA's authority to implement a revised ozone NAAQS under Subpart 2 versus Subpart 1 of the Act. *See* EPA App. 40a.[44]

EPA then argues that it "did not take final action in the 1997 ozone rulemaking to implement or enforce the revised ozone NAAQS," and that actual implementation of the revised 8-hour NAAQS will be the subject of later proceedings establishing designations and classifications for the 8-hour NAAQS. EPA Pet. 20. But here again, EPA attacks a strawman. CAA Industry Respondents did not

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[43] State Pet. at 14 (Industry argued that "EPA could neither issue nor enforce a revised ozone standard."); *see id.* at 22.

[44] Indeed, the lower court had to address CAA Industry Respondents' arguments regarding the enforceability of the revised NAAQS in order to fashion relief. *See* EPA App. 57a, 81a.

challenge EPA's designation or classification of areas under the 8-hour NAAQS. *See* EPA Pet. 20. Rather, they challenged EPA's legal conclusion, embodied in 40 C.F.R. § 50.9(b) of the final rule, State App. 113, that EPA has authority to revoke the statutory Subpart 2 ozone reduction program in certain areas, and to replace it in those areas with a program to be developed under the general planning authority of Subpart 1 for a revised ozone NAAQS that is more stringent than the 1-hour ozone NAAQS.

That decision was final. As EPA explained in the preamble to the final ozone rule, that rule reflects EPA's legal conclusion that "the provisions of subpart 2 . . . will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. . . . [T]he provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards."[45] EPA codified that final decision in § 50.9(b) of the final rule, State App. 113, which states that "[t]he 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard."

On this important issue, therefore, EPA's decisionmaking process was completed with promulgation of the final rule.[46] Furthermore, important legal consequences flow from this final rule, because of the differences in deadlines and control programs that apply under the Subpart 1 and Subpart 2 programs.[47]

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[45] 62 Fed. Reg. 38,873, ICP App. 75a.

[46] *See id.* (noting that EPA's interpretation of the applicability of Subpart 2 was revised "in light of comments received on its proposed interpretation.").

[47] Thus, contrary to the Agency's assertions, *see* EPA Pet. 23-24, EPA's resolution of the applicability of Subpart 1 versus Subpart 2 to a revised

Indeed, in *EDF v. Browner*, D.C. Cir. No. 98-1363, EPA has asserted that the lower court lacks jurisdiction to hear EDF's challenge to EPA's revocation of the 1-hour NAAQS and Subpart 2 program in specific areas, because EPA's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was addressed and resolved in the ozone NAAQS rulemaking. EPA Br. in *EDF v. Browner* 27-28, ICP App. 85a-86a. According to EPA, "[o]ther participants in the [ozone] NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation." ICP App. 86a.

Under CAA § 307(b), ICP App. 63a-64a, any challenge to a final legislative rule under the Act must be filed within 60 days of the rule's publication in the *Federal Register*. Because EPA resolved the interplay of Subpart 2 and EPA's NAAQS revision authority in the revised ozone rule and EPA's resolution of this issue is reflected in specific regulatory language (*i.e.*, § 50.9(b)), CAA Industry Respondents' only opportunity to challenge EPA's resolution of this issue was in this case.[48] For these reasons, EPA's belated attempt to manufacture a finality or ripeness argument provides no basis for certiorari.

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ozone NAAQS plainly meets the conditions for finality set forth in *Bennett v. Spear*, 520 U.S. 154 (1997), and other cases cited in its petition.

[48] EPA's reliance on cases not addressing final agency regulations, promulgated after notice and comment rulemaking and expressly made subject to pre-enforcement judicial review, is misplaced. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998); *Dow Chemical v. United States Environmental Protection Agency*, 823 F.2d 319, 324-25 (5th Cir. 1987) (distinguishing final rules, developed after notice and comment rulemaking, that "fix[] a legal relationship.").

B. EPA's Arguments on the Merits, Which Have Been Rejected by the Panel and by the Court of Appeals *En Banc*, Provide No Basis for Certiorari.

The other arguments in EPA's petition for rehearing have been considered and repeatedly rejected by the lower court. While EPA asserts that the court misunderstood the CAA, EPA Pet. 25, certiorari is not a forum simply to re-argue matters resolved by the court of appeals. The circuit court's resolution of the interplay between Subpart 1 and Subpart 2 in implementing a revised NAAQS does not conflict with the decision of any other court and does not present a question of federal law that warrants the attention of this Court. *See* Sup. Ct. R. 10.

In support of its petition, EPA argues once again that "the CAA does not precisely address "how to reconcile Subpart 1 . . . . with Subpart 2." EPA Pet. 27. This is simply not the case, as the lower court carefully explained.

First, the court observed that CAA § 181(a) on its face provides that "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under Table 1, by operation of law." EPA App. 38a. This language establishes that Subpart 2 applies to "all areas designated nonattainment under any ozone NAAQS." *Id.* As the court explained, because "Congress has spoken on the 'precise question at issue,'" the court must give effect to the language of the Act under the first prong of *Chevron*. *Id.*[49]

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[49] The court also reviewed the language of § 172(a)(1)(C) and (a)(2)(D), which specifically provides that the attainment date and classification provisions of Subpart 1 "do not apply to nonattainment areas for which

Second, the lower court addressed related CAA provisions, the structure of the Act, and its legislative history, and it found them all consistent with the plain language of § 181. For example, the panel rejected EPA's argument that the reference to "section 7407(d)" in § 181(a) should be read as "section 7407(d)(4)" in order to limit the application of Subpart 2 to areas that were designated nonattainment in 1990.[50] As the court observed, this is not the language of the statute, and the legislative history shows that Congress acted purposefully when it referenced "section 7407(d)" to make Subpart 2 applicable to *all* current and future ozone nonattainment areas. EPA App. 38a - 39a. As a result, the Subpart 2 program applies to one-hour *attainment* as well as one-hour nonattainment areas, *including [one-hour] attainment areas that are redesignated to nonattainment in the future.*[51]

Regarding the overall structure of the CAA nonattainment program, the court observed that "Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring

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classification and attainment dates are specifically provided under other provisions of this part," as they are for ozone in Subpart 2. EPA App. 35a. While ALA now argues that the general planning requirements of Subpart 1 in § 172(b) and (c) do not contain similar "ouster" provisions, ALA Pet. 26, the simple response is that "ouster" language is not needed in these later subsections of § 172 once areas are "ousted" from the deadline and classification provisions that trigger the planning requirements.

[50] *See also* EPA Pet. 28 n.16. (Subpart 2 should be read to apply "only for nonattainment areas designated under Section 107(d) for the then-current one-hour ozone standard," based on § 107(d)(1) and (4)).

[51] CAA § 181(b)(1), EPA App. 119a (providing deadlines for attainment that are "extended by operation of law" for areas that are "subsequently redesignated to nonattainment for ozone.")

areas into attainment." EPA App. 39a. In order to resolve this problem, Congress in Subpart 2 decided not to "continue [to treat] all ozone nonattainment areas alike," but to provide different attainment deadlines and different control strategies for different areas depending on the ambient levels of ozone in an area in excess of the one-hour NAAQS. EPA App. 40a.

For example, Congress in Subpart 2 made clear that areas with intractable ozone problems (e.g., Los Angeles and Houston) would have to apply specific and aggressive control programs, but would not be subject to near-term, inflexible deadlines that could threaten economic shutdown. *See* EPA App. 41a. The court found that while EPA might have authority to revise the ozone NAAQS, EPA did *not* have authority to ignore the balance struck by Congress in Subpart 2 in favor of an alternative ozone reduction program under Subpart 1 that could require even more drastic measures.

As the court explained, under "EPA's interpretation . . . [the Subpart 2 statutory] scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after Congress enacted the 1990 amendments." EPA App. 42a. EPA's assertion of authority to revoke the statutory Subpart 2 program "does not square with . . . the long-term nature of the attainment scheme enacted in Subpart 2," *id.*, and "clearly runs counter to the *comprehensive* enforcement scheme" based upon the one-hour NAAQS that Congress enacted in Subpart 2. EPA App. 41a (emphasis added).

The court also reviewed the legislative history, which shows that "Congress responded to the continued ozone problem [in 1990] by enacting a new enforcement scheme, which it codified as Subpart 2." EPA App. 32a. In other words, while Subpart 1 provides general planning requirements, Subpart 2 provides specific and detailed ozone-requirements for nonattainment areas, for attainment areas in

the ozone transport region, for "maintenance plans" in attainment areas, and for "attainment" areas that subsequently became "nonattainment" areas.[52] The legislative history confirms that Subpart 2 is "the Congress's comprehensive plan for reducing ozone levels *throughout* the country." EPA App. 33a (emphasis added).

In response to EPA's petition for rehearing below, the court clarified and confirmed its holding that "EPA can enforce a revised primary ozone NAAQS *only* in conformity with Subpart 2." EPA App. 81a (emphasis added).[53] The court also emphasized that its remand order was "without prejudice to the ability of any party to apply for vacatur" should EPA attempt to implement the revised standard. *Id.* As a result, the decision on rehearing confirms that, as the court held, the 1990 Amendments to the Act "must preclude the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a. (emphasis added).

Finally, EPA argues that the lower court's decision will disrupt EPA's plans regarding ozone reductions.[54] But it is EPA's rule that has disrupted the carefully crafted *congressional* program for ozone reductions, and the court of appeals simply restored that program – a program that has produced and is continuing to produce substantial reductions in ozone. EPA's continued disagreement with this decision

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[52] *See* CAA §§ 182-185A, ICP App. 8a-62a; *see also* H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. 3169 - 3172, 3253-3282.

[53] The State Petitioners correctly observe that Judge Tatel's concurring statement "is hard to reconcile . . . with the panel's opinion" regarding the non-enforceability of the revised ozone NAAQS. *See* State Pet. 22 n.8.

[54] *See* EPA Pet. 11; *see also* State Pet. 17, 28.

presents no conflict of law or important issue that merits certiorari.

C. The Interlocutory Nature of the Lower Court's Decision Counsels Against Granting Certiorari on the Subpart 2 Questions Presented by EPA.

The court of appeals remanded the revised ozone NAAQS to EPA because the Agency refused, as a statutory matter, to consider the increased public health risks (due to increased UVB radiation exposure) its revised standard would create. *See* EPA App. 47a - 48a. As a result, regardless of what this Court does here, EPA will have to undertake further rulemaking on the ozone standard to determine whether *any* standard revision is "appropriate" under § 109(d) in light of (1) the increased cancer and mortality risks associated with a more restrictive standard that increases UVB radiation exposure,[55] and (2) the conclusion of its independent science advisers that *none* of the alternative air quality levels under consideration can be distinguished as significantly more protective of public health.[56]

Because there will be additional rulemaking addressing the appropriateness of standard revision regardless of any action

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[55] Ozone reductions of the magnitude associated with EPA's revised standard could result in 2,000-11,000 additional cases of melanoma skin cancer per year, 25-50 melanoma related deaths per year, and up to 28,000 new cataract cases per year due to increased ultraviolet-B radiation exposure. R. Lutter and C. Wolz, "UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard," 31 *Env'tl. Sci. & Tech. News* 142-46 (1997), Ozone JA 2759.

[56] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236.

by this Court, certiorari is unnecessary on the Subpart 2 issues.

CONCLUSION

For the foregoing reasons, if certiorari on the "nondelegation" issue is granted, it should embrace the issue presented by CAA Industry Cross-Petitioners in their Conditional Cross-Petition for Certiorari. Otherwise, certiorari should be denied on the questions presented by the Government and other petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1999

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

MASSACHUSETTS AND NEW JERSEY,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN RESPONSE FOR RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected the Environmental Protection Agency's ("EPA's") standardless interpretation of Sections 108 and 109 of the Clean Air Act ("the Act"), and remanded under *Chevron* for EPA to fashion and apply a proper interpretation of the Act.

2. Whether the court of appeals acted within its jurisdiction in reviewing, as a final agency action ripe for review, EPA's ruling that it can implement a revised National Ambient Air Quality Standard ("NAAQS") for ozone pursuant to its general implementation authority under Section 172 of the Act, notwithstanding Congress' enactment of a specific implementation schedule for the ozone NAAQS in Section 181 of the Act.

3. Whether the court of appeals correctly held that the specific classifications and attainment dates set forth in Section 181 of the Act for the ozone NAAQS take precedence over EPA's general authority to devise classifications and attainment dates for the various NAAQS pursuant to Section 172 of the Act.

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INTRODUCTION

A properly reformulated version of the Government's first question is worthy of this Court's review for the reasons summarized in Part I below and detailed in the conditional cross-petition filed today by the American Trucking Associations, Inc., the Chamber of Commerce of the United States, and other "Small Business Petitioners" below (collectively "ATA"). The court of appeals invalidated the Environmental Protection Agency's ("EPA's" or "the Agency's") interpretation of its standard-setting authority under the Clean Air Act ("CAA" or "the Act"), using the framework provided by this Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). While the constitutionality of the underlying statutory provisions was never at issue, the court deployed the nondelegation and constitutional avoidance doctrines to invalidate EPA's statutory interpretation and to remand under *Chevron*. The court of appeals' interpretation was constrained by *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*"), a decision never reviewed by this Court. ATA acquiesces in *certiorari* on a question properly framed to include all of the interrelated issues involving the interpretation of EPA's standard-setting authority, recognizing that the constitutional issues discussed below might be avoided entirely if *Lead Industries* were held to be wrongly decided.

The second and third questions presented by the Government (as well as the similar questions presented by the American Lung Association and State petitioners), concern entirely separate provisions of the Act, and are patently unworthy of *certiorari*. They involve Subpart 2 of the Act's Title I, Part D, which codifies a detailed schedule for gradual attainment of the National Ambient Air Quality Standard ("NAAQS") for ozone. At issue is EPA's decision to supplant Subpart 2 by requiring the States to attain a revised ozone NAAQS on an accelerated schedule that overrides the Subpart 2 schedule. The Agency's justification? That the *specific* classifications and attainment dates set forth in Subpart 2 do not "restrict EPA's *general*

authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

The court of appeals unanimously rejected EPA's argument and not a single judge voted to rehear the case on this issue. The Government's attempt to dress up its Subpart 2 point by belatedly raising finality and ripeness arguments was also unanimously rejected by all three panel members, and drew no interest from the *en banc* court. As explained in Part II below, the second and third questions do not warrant *certiorari* for at least three separate reasons.

First, the court of appeals' ruling on Subpart 2, unlike its ruling on the main issue presented, is interlocutory. That is because the court of appeals unanimously reversed EPA's ozone NAAQS on other grounds. Specifically, EPA argued that it was barred by statute from considering record evidence from officials of three separate federal agencies that reducing ground-level ozone by the amounts predicted for EPA's ozone NAAQS could lead to thousands of additional skin cancer and cataract cases every year. The unanimous court of appeals made quick work of that argument, both in its initial decision and in denying rehearing.

The Government does not seek *certiorari* on this issue and indeed never even mentions that it must redo its ozone NAAQS *independently* of the issues on which *certiorari* is being sought. But that remarkable omission cannot disguise the fact that the substantial new proceedings now required will take years to complete. Specifically, the Agency must commence a new rulemaking that will require, *inter alia*: (1) a revised scientific review document; (2) additional review by the Clean Air Scientific Advisory Committee ("CASAC"); and (3) a new proposal and final rule that address the evidence, cited by the court of appeals, that lowering the ozone NAAQS may have a *negative* net health effect. Every aspect of the Subpart 2 issue is on hold until these proceedings are completed. Only then would any remaining questions about the implementation schedule for a newly revised ozone NAAQS have to be revisited

by the court of appeals and, if necessary, this Court. *See* Part II-A below.

Second, the Government's merits argument concerning Subpart 2 is entirely unconvincing, as the unanimous court of appeals decision demonstrates. It is a "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Tellingly, not one member of the D.C. Circuit accepted EPA's contention that the scheme for implementing *NAAQS in general* trumped the specific provisions of Subpart 2 governing implementation of the *ozone NAAQS* in particular. *See* Part II-B below.

Finally, there is simply no basis for the Government's argument that the court of appeals lacked jurisdiction to reach the Subpart 2 issue. EPA never argued that the Subpart 2 ruling which *it* had made in the rulemaking below was not final until *after* the panel unanimously ruled against the Agency. Even EPA's rehearing petition devoted only about one page to arguing finality and ripeness – arguments that were unanimously rejected. Even now, the Government relies only on easily distinguishable cases that hold only that agency rulings sometimes are not final where (unlike here) they were *not* subject to formal notice and comment rulemakings, were *not* published in the Federal Register, and were *not* expressly made subject to prompt judicial review by statute. None of these cases presents a circuit conflict with the decision below, nor can the Government plausibly argue that the panel's application of settled finality and ripeness principles conflicts with any decisions of this Court. *See* Part II-C below.

COUNTERSTATEMENT OF THE CASE

A. The Clean Air Act

Section 109 of the Act authorizes EPA to establish primary and secondary NAAQS for certain pollutants and to reconsider and, if necessary, amend those standards every five years. CAA § 109(a), 42 U.S.C. § 7409(a). In general, NAAQS enactment

and enforcement entails three steps: promulgation, designation/classification, and then implementation through State Implementation Plans ("SIPs"). Primary NAAQS are promulgated at levels "requisite to protect the public health" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Secondary NAAQS are to be set at levels "requisite to protect the public welfare." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2).

Following the promulgation of a NAAQS, EPA must designate each air quality area as an attainment, nonattainment, or unclassifiable area. *See* CAA § 107(d), 42 U.S.C. § 7407(d). The Agency then classifies each such area based on "factors such as the severity of nonattainment in such area," and assigns an attainment date based on that classification. *See* CAA § 172(a)(1), (2), 42 U.S.C. § 7502(a)(1), (2) ("Subpart 1").

As part of its 1990 amendments to the Act, Congress provided a "comprehensive plan for reducing ozone levels throughout the country." App. 33a. Each area is assigned a statutory classification based on the extent of its noncompliance with the existing ozone NAAQS, as well as a specific attainment date based on that classification. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) ("Subpart 2"). Congress enacted this regime to "strip[] the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment . . . ." App. 40a.

B. The EPA Rulemakings

Following the 1990 amendments, EPA initiated two rulemakings in 1996 to revise the NAAQS for ozone and particulate matter.

1. The Ozone Rulemaking

EPA's Clean Air Scientific Advisory Committee ("CASAC") is an independent scientific review committee that EPA must consult regarding NAAQS revisions. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2). In the ozone rulemaking, CASAC advised

the Agency that "there is no 'bright line' which distinguishes any of the proposed standards . . . as being significantly more protective of public health." J.A. (Ozone) at 239. EPA nonetheless replaced the existing 0.12 ppm one-hour ozone NAAQS with a 0.08 ppm eight-hour standard based on a "policy" judgment that the latter standard is "sufficient[]" in light of "hazards that research has not yet identified" and "uncertainties associated with inconclusive scientific and technical information." 62 Fed. Reg. 38,856, 38,857, 38,863, 38,867 (July 18, 1997). In so doing, EPA asserted the right to render decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." *Id.* at 38,883 (emphasis added).

The Agency also ruled out any consideration of the health tradeoffs (for example, the prospect that reducing ground-level ozone could increase cancer levels) or the economic costs of its proposed rule. Commenters had submitted evidence that the health disbenefits of reducing ground-level ozone to the degree that EPA proposed could more than offset any benefits from increased respiratory protection. In particular, a study by the United States Department of Energy documented that, while the new ozone standard would cause some reduction in respiratory ailments, it would also increase the incidence of skin cancer, melanoma, and cataracts by permitting more ultraviolet radiation to reach ground level. J.A. (Ozone) at 255-71. A further study by Office of Management and Budget staff members concluded that the "adverse health effects of . . . EPA's more stringent [ozone] NAAQS may be similar in magnitude to the respiratory-related beneficial effects of such an [ozone] reduction," and a study by EPA personnel produced comparable results. *See id.* at 2764, 3089. Nonetheless, the Agency claimed that taking account of all health effects would be "inconsistent with the Clean Air Act and ill advised from an environmental management policy perspective." *Id.* at 210.

EPA also refused to consider the economic costs of its proposed standard on the ground that *Lead Industries* and subsequent D.C. Circuit decisions "interpreted section 109 of the Act as precluding consideration of the economic costs or feasibility of NAAQS in setting them." 62 Fed. Reg. at 38,878. The Agency acknowledged, however, that the costs of attaining the revised ozone NAAQS would greatly *exceed* the resulting benefits, perhaps by as much as six times. *See* J.A. (Ozone) at 2919, 2924, 2932-34 (costs could exceed $9 billion; benefits could be as low as $1.5 billion).

EPA also rejected the contention, made by many commenters, that it lacked authority to revise the ozone NAAQS. Those commenters relied on Subpart 2 of the 1990 amendments, which requires EPA to classify each nonattainment area into one of five specific categories, and does not provide a category for areas with ozone levels lower than 0.12 ppm (the level of the existing ozone NAAQS). EPA responded that because Subpart 2 "simply govern[s] the implementation of the [existing ozone] standard," the Agency is free to revise the ozone NAAQS and then ignore Subpart 2 altogether. *See* 62 Fed. Reg. at 38,885.

2. The PM Rulemaking

The PM rulemaking consisted of essentially two rulemakings: one rulemaking on fine PM ("$PM_{2.5}$"), and one rulemaking on coarse PM ("PM_{10}"). Since 1988, EPA had regulated all particles with diameters less than 10 micrometers under a single standard. *See* App. 49a. In the rulemaking below, however, EPA determined that "coarse and fine particles pose independent and distinct threats to public health," and that separate standards should be established. *See id.*

Although EPA concluded that the PM standards should be strengthened, CASAC expressed skepticism that this was necessary. In particular, nearly half of CASAC's members concluded that the PM standard should not be tightened at all, and many of the remaining panelists agreed that EPA's

proposed standard was too strict. *See* J.A. (PM) at 3151, 3165-66. These CASAC panelists explained that EPA had "overstated" the claimed health benefits of its proposal, in part because pollutants other than PM might be responsible for the effects that EPA attributed to PM. *See id.*

In response, EPA acknowledged the great "uncertainty in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. 38,652, 38,655 (July 18, 1997). As it had in the ozone rulemaking, however, EPA asserted the right to promulgate the revised standard based on an *ad hoc* analysis that recognizes "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38,688.

EPA also acknowledged that compliance with its revised PM NAAQS would cost at least $37 billion annually, J.A. (PM) at 3477, making this the most expensive environmental program ever. By EPA's own estimate, the costs of even partial compliance would greatly *exceed* the total annual sales of small businesses in several sectors, and therefore drive such companies out of business altogether. *Id.* at 3611-12, 3628. As it had in the ozone rulemaking, however, EPA publicly stated that it would not consider these extraordinarily high costs. 62 Fed. Reg. at 38,683.

C. The Congressional Response

Congress responded by postponing the implementation of the revised ozone and PM standards, and thus providing time for pre-implementation judicial review. *See* Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 107 (1998). In particular, Congress delayed implementation of the PM NAAQS until such a time as $PM_{2.5}$ monitors are put in place and three years' worth of data have been gathered. *See id.* § 6102. It also pushed back implementation of the ozone NAAQS by one year. *See id.* § 6103(a). Congress emphasized that "[n]othing" in its action

"shall be construed . . . to be a ratification of the ozone or [PM] standards." *Id.* § 6104.

D. The Court of Appeals Proceedings

1. Panel Proceedings

Before the court of appeals, EPA continued to assert that "nothing in the statute requires [the Administrator] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Ozone Br. at 43 (emphasis added). The D.C. Circuit disagreed. In particular, the court held that Section 109 must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. *See* App. 5a. The court of appeals accordingly "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement," and, "if appropriate, modify the disputed NAAQS." *Id.* 4a, 5a. Judge Tatel dissented on this point. *See id.* at 59a.

The D.C. Circuit also unanimously remanded for entirely separate reasons. In the coarse particulate case, the court held that EPA erred in adopting an "arbitrary indicator for coarse particle pollution." *Id.* at 53a. As for ozone, the court rejected, both as contrary to the plain language of the Act and as unreasonable, EPA's "bizarre" contention "that a statute intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." App. 47a.

Finally, while the court of appeals unanimously accepted EPA's contention that, notwithstanding the detailed provisions of Subpart 2, the Agency may still revise the ozone NAAQS, *see* App. 31a-43a, it unanimously rejected EPA's contention that "Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the [existing] ozone NAAQS." *Id.* at 37a. The plain language and drafting history of Subpart 2 confirm that the subpart applies to all ozone NAAQS, including revised NAAQS. *See id.* at 38a-39a. Because Congress' detailed handiwork was "purposeful

and not the drafting error that EPA's interpretation implies," "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with . . . Subpart 2." *Id.* at 34a.

2. Rehearing Proceedings

In a petition for rehearing, EPA's lawyers argued that the Agency had followed a constitutional interpretation of the Act in the underlying rulemakings. The panel majority rejected that contention, and explained that "the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom." App. 73a. Accordingly, the court "express[ed] no opinion" on these *post hoc* rationalizations. *See id.* at 74a. The panel majority went on to emphasize that, when read in light of its context and purpose, the Act *could* be interpreted to provide a constitutionally sufficient "intelligible principle." App. 75a. Because the Act is ambiguous as to what that principle is, however, the court held that the appropriate remedy is a remand to the agency for development of a constitutional construction. *Id.* at 76a (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)).

EPA's rehearing petition also argued, for the first time, that the panel lacked jurisdiction to reach the Subpart 2 issue because the Agency "has taken no final action implementing the revised NAAQS." App. 77a. All three judges rejected that contention. *Id.* at 79a. The court explained that "[w]hether agency action is final for purposes of [judicial review] entails a functional, not a formal, inquiry." *Id.* at 77a. Here, EPA had expressed its definitive position on the implementation issue, which is "a pure question of law, the resolution of which would not benefit from a more concrete setting." *Id.* at 77a-79a. In addition, EPA's promulgation of the revised NAAQS "triggered" certain statutory provisions that "impose a number of requirements upon the states." *Id.* at 78a.

On the merits, EPA continued to press its contention that Subpart 2 amounts to a massive scrivener's error. *See* App. 79a. All three members of the panel again rejected that contention, and noted that "all five Subparts of the Clean Air Act providing requirements for nonattainment areas" contain the same language. *See id.* The *en banc* court unanimously denied rehearing on the Subpart 2 issue.

Two opinions dissenting from the denial of rehearing *en banc* addressed the main statutory interpretation questions. *See* App. 92a. Judge Silberman's dissent disagreed with the panel majority's use of the nondelegation doctrine. But he went on to emphasize that he was "quite uncertain" whether EPA's analysis satisfied the demands of "arbitrary and capricious" review. *See id.* at 96a. Judge Tatel also dissented from denial of rehearing and focused on use of the non-delegation canon. His opinion was joined by Chief Judge Edwards and Judge Garland. *See id.* at 97a.

REASONS FOR GRANTING THE PETITION IN PART AND DENYING THE PETITION IN PART

I. THE COURT SHOULD GRANT *CERTIORARI* BOTH ON THE GOVERNMENT'S FIRST QUESTION AS REFORMULATED TO REFLECT THE COURT OF APPEALS' ACTUAL HOLDING AND ON ATA'S CONDITIONAL CROSS-PETITION.

ATA submits that the court of appeals was certainly correct when it invalidated EPA's standardless interpretation of Sections 108 and 109, but also that the proper interpretation of these provisions is so exceptionally important that *certiorari* is warranted on that issue. In rejecting EPA's interpretation under *Chevron*, the panel majority faithfully followed this Court's precedents holding that constitutional avoidance and nondelegation principles retain vitality as construction canons. While the court was right to condemn EPA's assertion of unbridled and *ad hoc* policymaking authority, ATA submits that all sides would benefit from this Court's authoritative

construction of the Act for the reasons set forth in ATA's conditional cross-petition.

A. The Court of Appeals Correctly Employed Constitutional Avoidance and Nondelegation Principles to Invalidate EPA's Standardless Statutory Interpretation.

The Government bases its unusually strong condemnation of the court of appeals' decision on a red herring. The court of appeals did not hold Section 109 unconstitutional, much less mark out a "radical departure from settled law." Pet. 9. Instead, the D.C. Circuit merely (1) applied the traditional rule that agencies must construe their authorizing statutes to provide some "intelligible principle" to confine agency discretion and guide judicial review; and, finding that EPA failed to follow such an interpretation, (2) "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement." App. 4a, 5a.

It is therefore common ground that "'in our increasingly complex society . . ., Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" Pet. 16 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). There is also no dispute that while "the doctrine of unconstitutional delegation is . . . a fundamental element of our constitutional system," it is not "readily enforceable by the courts" in the manner of other constitutional guarantees. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

Confronted by these exigencies, the Court has responded, not by abandoning this "fundamental element" of the Constitution, but by transforming the nondelegation doctrine into a canon of construction. In particular, this Court has consistently held that Congress may delegate policymaking discretion to agencies *if* it provides an "intelligible principle" to guide the exercise of that discretion. *See, e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta*, 488 U.S. at 372; *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976). And, consistent with the

doctrine of constitutional avoidance, this Court has wielded this rule to construe statutes narrowly in order to supply the requisite "intelligible principle." *See, e.g., Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (plurality opinion) ("*Benzene*"); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). Accordingly, while consistently rejecting claims that statutes should be *struck down* under the non-delegation doctrine, this Court has never waivered in "*giving narrow constructions* to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 374 n.7 (emphasis added).

The court of appeals' deployment of these well-established construction canons hardly constitutes a "striking departure from this Court's nondelegation jurisprudence." Pet. 11. Rather, the "striking" fact about this case is that an agency of the federal government would assert and then defend up to the Supreme Court a supposed right to allocate tens of billions of dollars of public and private resources through decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." 62 Fed. Reg. at 38,688 (emphasis added).

Nor is there truth in the various other hyperbolic accusations hurled by the Government. Far from "overlooking this Court's instruction that the starting point for analysis of a nondelegation claim should be the statute's language, purpose, history, and context," *see* Pet. 12 (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)), the court of appeals expressly complied with that instruction, instructed the Agency to follow it, and quoted *American Power & Light* for that very proposition. *See* App. 75a. Nor did the court "expressly reject[] EPA's view that the relevant provisions of the CAA . . . set out intelligible principles." Pet. 7-8 (mischievously citing the *entirety* of the rehearing opinion below). Instead, the court proposed such a principle itself, noted that EPA "may well find

a completely different method for securing reasonable coherence" on remand, and went out of its way to "express no opinion" on the sufficiency of a principle proposed for the first time by EPA's appellate counsel on rehearing. *See* App. 18a, 74a. And finally, far from holding that "the nondelegation doctrine requires . . . a quantitative rule for deciding the precise degree of protection required for a given health or safety standard," Pet. 17; *see also id.* (court requires "exactly the 'right' result"), the panel made clear that EPA would retain authority to exercise "'policy judgment,'" and noted that it had previously upheld on nondelegation grounds an agency interpretation that allowed standards to be set "somewhere between" a given level and "some 'moderate' departure from that level." *See* App. 12a-13a.

As the court of appeals patiently explained, constitutional issues are lurking in this case only because the Agency's "construction" of its governing statute amounts to no construction at all. Specifically, the interpretation fails to "speak to" the critical question presented by the statute – the "issue of degree"– and thus leaves the agency "free to pick any point" it chooses. *See* App. 5a, 7a, 13a. Moreover, the inherent vice of EPA's interpretation is further worsened by the context in which it was issued – promulgation of the most expensive environmental program ever. In view of "the unprecedented power over American Industry that would result from the Government's view," a construction that "avoids this kind of open-ended grant should certainly be favored." *See Benzene*, 448 U.S. at 645, 646 (plurality opinion).

In the end, the Government is left with the surprising accusation that, by remanding to EPA so that the Agency itself can adopt a more constrained view of its authority, the court of appeals undertook a "fundamental change in the nature of judicial review of agency standard-setting" that would "expand the role of courts" and lead to "otherwise unwarranted judicial supervision in the exercise of administrative discretion." *See* Pet. 9, 16-17.

Once again, this is mere hyperbole. On its own terms, the court of appeals simply made the inevitable reconciliation between use of the modern nondelegation doctrine as a tool of interpretation, on the one hand, and the deference accorded under *Chevron* to agencies' interpretations of their governing statutes, on the other. As the court of appeals explained, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority." App. 76a (citing *Chevron*). In this regard, the remedy selected below is functionally indistinguishable from the work-a-day remands courts issue every time they invalidate an unreasonable agency interpretation under *Chevron*. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999); *City of Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191 (D.C. Cir. 1991).

B. This Court Should Grant *Certiorari* on a Properly-Formulated Question That Encompasses the Statutory Interpretation Issues Covered in ATA's Conditional Cross-Petition.

The Government now concedes that EPA must develop a new interpretation of Sections 108 and 109 – at least to the extent necessary for it to consider the health "disbenefits" of lowering ground-level ozone levels. ATA agrees that EPA would benefit from this Court's plenary construction of these same sections, including whether the court of appeals was correct that EPA must ignore all factors "other than 'health effects relating to pollutants in the air'" in setting NAAQS. App. 15a; *see* ATA Cross-Petition. Review by the Court at this stage would increase the likelihood that EPA's next NAAQS rulemaking will be more successful than its last. *Cf.* Pet. 19 ("This Court should grant review . . . before EPA and other agencies refocus the[ir] analyses").

As drafted by the Government, however, the first question contains two significant flaws. *First*, it is somewhat misleading,

as it emphasizes the issue of whether Section 109 is unconstitutional (which it undisputedly is not), and downplays the real issue in this case: whether EPA used a standardless *interpretation* when issuing its ozone and PM NAAQS. Accordingly, the question presented should be reformulated to reflect accurately the holding of the court of appeals, and thus the issue before this Court, to wit: whether the court of appeals correctly rejected EPA's standardless interpretation, and remanded under *Chevron* for the Agency to fashion and apply a proper interpretation.

Second, the Government's question fails expressly to mention the court of appeals' interrelated and imbedded ruling that EPA may not consider "any factor other than 'health effects relating to pollutants in the air'" in setting a NAAQS. App. 15a. The court below recognized that this ruling would constrain the Agency's ability to develop an "intelligible principle" on remand, but felt it was precluded by circuit precedent from ruling otherwise. *See id.* at 18a. In order to ensure that *this Court* is not encumbered by arguments contending that it is jurisdictionally barred from issuing a comprehensive interpretation of the relevant provisions, and also to ensure that EPA receives the full and final guidance that it has requested, the Court should grant, or at least hold in abeyance, ATA's conditional cross-petition.

II. THIS COURT SHOULD DENY *CERTIORARI* ON THE SUBPART 2 QUESTIONS PRESENTED.

If it had properly formulated and presented its first question alone, EPA would have brought before the Court what is likely the most significant administrative law case since the 1980s trilogy of *Benzene*, *Chevron*, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). But instead, EPA has sought to piggy back onto that single *cert*-worthy question, two additional questions that do not deserve the Court's attention. Those two additional questions, both entirely unrelated to the main question presented, are (1) whether the court of appeals erred in

unanimously concluding that EPA's rulings on the Act's Subpart 2 are final and ripe for review; and (2) whether the court erred in unanimously rejecting EPA's contention that Subpart 2 could be effectively nullified. Taking those two unworthy questions would needlessly complicate what already promises to be an unusually complex case with numerous parties and the intersection of statutory construction, constitutional, and administrative law issues. As demonstrated below, neither question is remotely worthy of *certiorari*.

A. This Court Should Deny *Certiorari* on Both Subpart 2 Questions, Because, Unlike the Main Issue, Those Questions Are in an Interlocutory Posture.

Resolution of the second and third questions presented by EPA would have no practical effect at this time. Those issues address the question whether EPA may *implement* and *enforce* a revised ozone NAAQS outside of the framework provided by Subpart 2. They do *not* address – indeed they are entirely separate from – the question of the statutory standards and record that govern EPA's *promulgation* of a revised ozone NAAQS. Accordingly, any ruling by this Court on the second and third questions presented would not take effect until EPA promulgates a revised ozone NAAQS on remand – a point that EPA itself has underscored by suspending its implementation activities following the D.C. Circuit's invalidation of the revised ozone NAAQS. *See* 64 Fed. Reg. 57,424, 57,425 (Oct. 25, 1999).

How far off is a conclusion to any ozone remand proceedings and the first practical effects of the appellate court's Subpart 2 decision? *First*, EPA must revise its Section 108 criteria document for ozone, which will entail scientific review of not only ozone's heretofore ignored "positive effects," but also of the rest of "the latest scientific knowledge" relevant to ozone's effects on human health and welfare. CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). *Second*, CASAC must review that revised criteria document. CAA § 109(d)(2)(B), 42 U.S.C.

§ 7409(d)(2)(B). *Third*, EPA must draft a revised ozone NAAQS based in part on the revised criteria document and CASAC's review. *See* CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). *Fourth*, EPA must provide CASAC sufficient time to review its new proposal. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2)(B). *Fifth*, EPA must issue a notice of proposed rulemaking that explains any differences between its proposed rule and CASAC's recommendations. *See* CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). *Sixth*, EPA must permit time for meaningful comment, and respond to all significant comments. *See* CAA §§ 307(d)(5), (6)(B), 42 U.S.C. §§ 7607(d)(5), (6)(B).

All by itself, the three to five years that likely will be required to complete these steps is sufficient to warrant denial of *certiorari* on both Subpart 2 questions. "[E]xcept in extraordinary cases, the writ [of *certiorari*] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Ironically, EPA's petition only underscores this dispositive point. By principally contending that the D.C. Circuit erred on finality/ripeness grounds, EPA would place the proper time for review even farther out into the future.

To be sure, EPA must hope that its unworthy Subpart 2 issues can be smuggled into this Court under cover of the entirely separate first question presented. But the logic of ATA's acquiescence to *certiorari* on the main issue does not carry over to the Subpart 2 issues. On the main question, there is substantial disagreement within the D.C. Circuit, the nation's busiest administrative law court, concerning the interrelated statutory construction, constitutional, and administrative law issues presented here. Even if presented in an interlocutory posture (which it is not), *that* question – as opposed to unanimous rulings on non-recurring issues – is the type of question on which the Court might properly grant *certiorari*. *Cf.* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE § 4.18 at 196 (7th ed. 1993) (interlocutory *certiorari* may be granted

"where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case").

But more importantly, the main question, unlike the Subpart 2 questions, is *not* in an interlocutory posture. EPA's regulations for fine particulate matter – the costliest part of the combined rulemakings with a minimum price tag of *$37 billion per year* – were invalidated based *only* on the court's rejection of EPA's standardless interpretation of the Act. If that invalidation is overturned, the fine PM rules would spring immediately back to life. By contrast, the Subpart 2 implementation issues are of no practical moment until EPA has completed the lengthy, multi-year remand proceedings independently required for ozone. Accordingly, even if the Subpart 2 issues otherwise warranted review (which they do not, *see* Sections B and C below), both the court of appeals and this Court will have ample time to provide that review years hence, once a valid ozone NAAQS has been promulgated. Until then, *certiorari* should be denied.

B. The Subpart 2 Merits Question Does Not Warrant *Certiorari*.

Under the traditional test for *certiorari*, the Subpart 2 merits issue may be one of the most unlikely candidates for review that this Court ever encounters in a government petition. Put aside the absence of dissents on this issue below, at either the panel or the *en banc* stage. The truth remains that the court's Subpart 2 ruling affects the interpretation of only one statute, can never give rise to a split among the circuits, and will not have any practical effect for years to come. As demonstrated below, those facts, coupled with an ever-changing EPA position on the issue and a decision below that is unassailable on its merits, make this issue a most unlikely candidate for *certiorari*.

1. The Subpart 2 Merits Question Fails to Satisfy the Criteria for Certiorari. The Subpart 2 issue involves "EPA's authority to implement and enforce [a] revised ozone NAAQS." Pet. 19-20. But the essential precondition to implementing or

enforcing a "revised" ozone NAAQS is, of course, the valid *promulgation* of a revised ozone NAAQS. Until that occurs, questions of enforcement and implementation cannot possibly arise.

In the meantime, there is no chance that the D.C. Circuit's decision will have ripple effects. Only the D.C. Circuit reviews NAAQS revisions, CAA § 307(b), 42 U.S.C. § 7607(b), so there is no potential for an inconsistency to develop among the circuits. Nor did the D.C. Circuit misstate or improperly invoke the rule of *Chevron*, the governing legal principle here. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *cf. Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("perceived correctness" is not a primary factor in granting *certiorari*); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Supreme Court does not sit as court of error).

For their part, the state petitioners claim that review is needed to dispel the "enormous uncertainty for the states as regulators." *See* Pet. of Mass. and N.J. 29. But any "uncertainty" that might once have existed has now been dispelled by the passage of the deadline for challenging the ruling invalidating the ozone NAAQS for EPA's failure to consider health "disbenefits." All States now know or should know that the 0.12 ppm one-hour ozone NAAQS, implemented and enforced via the congressionally-enacted regime of the Act's Subpart 2, is the only enforceable ozone NAAQS for the foreseeable future. True enough, there may be time lags involved as EPA reshapes its regulations to conform to this legal reality. *See id.* at 26-27 (describing such problems). But that is always the case when agency actions are reversed and new proceedings must be commenced.

Moreover, notwithstanding its claim to deference, *see* Pet. 25, 28-29, EPA now asserts that it has yet to complete its "full thinking" on this issue. *Id.* at 24; *see also id.* at 10 (Agency still needs time "to develop fully its interpretation").

This is an EPA assertion that rings true. Before the appellate panel, EPA argued that Congress had committed a particular scrivener's error. *See* App. 42a (EPA argues "section 107(d)" actually means "section 107(d)(4)"). Before the *en banc* court it argued for a different scrivener's error. *See id.* at 42a (EPA argues "section 107(d)" actually means "section 107(d)(1)(C) and section 107(d)(4)"). In this Court, EPA has now put claimed scrivening errors aside in favor of arguing about the statutory "context[s]." Pet. 28 n.16; *see* pp. 22, below. There should accordingly be an extraordinarily strong, conclusive presumption against review here, where EPA continues to change legal theories and the court of appeals has expressly left open the door to further proceedings once EPA promulgates a new rule (and identifies a coherent statutory interpretation) years out into the future. *See* App. 81a.

2. The D.C. Circuit Correctly Decided the Subpart 2 Merits Question. The Subpart 2 legal issue no doubt appears complex to the uninitiated. It involves EPA's authority to promulgate a revised ozone NAAQS, and then designate, classify, and set attainment dates for areas based on that revised NAAQS. In this Court, however, EPA seeks *certiorari* on a very narrow, easily-answered issue: whether the *specific* classifications and attainment dates set forth in Subpart 2 of the Act for the ozone NAAQS "restrict EPA's *general* authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

EPA's question answers itself, for "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Moreover, EPA's theory, as the court of appeals unanimously recognized, would have rendered Subpart 2 "stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments," and then proceeded to implement the revised NAAQS outside of the Subpart 2 framework. App. 42a. As the court of appeals held,

EPA cannot so easily eviscerate the "comprehensive enforcement scheme enacted in Subpart 2." *Id.* at 41a.

EPA correctly acknowledges that this issue turns on "the interplay among Section 107(d), Section 172, Section 181, and other relevant provisions" of the Act. *See* Pet. 24. Section 107(d) requires that "upon promulgation or revision" of a NAAQS, "the Administrator shall promulgate the designation of all areas" as "attainment," "nonattainment," or "unclassifiable." CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). As a general matter, Section 172 of Subpart 1 of the Act grants EPA authority to give classifications to those areas that it has designated as being in nonattainment, and to set attainment dates for those areas based on their classifications. *See* CAA § 172(a), 42 U.S.C. § 7502(a). By Section 172's own terms, however, that authority "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part," or "with respect to areas for which attainment dates are specifically provided under other provisions of this part." CAA §§ 172(a)(1)(C), (2)(D), 42 U.S.C. §§ 7502(a)(1)(C), (2)(D).

In the case of the ozone NAAQS, Section 181 of Subpart 2 provides that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) of this title [CAA § 107(d)] *shall* be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1 then provides classifications and attainment dates based on a region's design value (a measure of its ozone level). *See id.*

As the court of appeals explained, these provisions unambiguously refute EPA's contention that it can ignore Subpart 2 by "establish[ing] classifications and attainment dates and tak[ing] other implementing actions for the revised ozone NAAQS under Subpart 1." Pet. 27. In particular, Section 181(a) states that it applies to "[*e*]*ach* area designated

nonattainment for ozone *pursuant to section 7407(d)* [*CAA section 107(d)*]"; and Section 107(d), in turn, governs the "promulgation *or revision* of a national ambient air quality standard." *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added); CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i) (emphasis added). Subpart 2 thus applies by the plain terms of Sections 107(d) and 181(a)(1) to *any* "ozone" NAAQS, including a revised ozone NAAQS.

EPA thus finds itself with no rejoinder for the argument that "Congress has spoken to the precise question at issue" and resolved it adverse to EPA. *See* App. 38a (citation and internal quotation marks omitted). The argument EPA tried below, that section 172 provides authority to enforce a revised NAAQS entirely apart from section 181(a) and the rest of Subpart 2, *see* EPA Ozone Br. at 67, is of no help, for that section emphasizes that it "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part." CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C).

In the court of appeals, EPA also argued that Section 181(a)(1)'s reference to the entirety of "Section 107(d)" is a scrivener's error, and that Subpart 2 should instead be read to apply only to designations made under particular parts of Section 107(d). *See, e.g.*, App. 79a. But as the D.C. Circuit explained, there is no basis for deeming the plain language of Section 181(a)(1) the "drafting error that the EPA's interpretation implies." *Id.* at 39a. In fact, "all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d)" in its entirety. *Id.* at 79a. EPA's "interpretation" thus posits not an isolated scrivening error, but a total scrivening breakdown.

Although derided by EPA as "highly technical," App. 28 n.16, the appellate court's analysis is a conventional, straightforward, statutory interpretation under the first prong of *Chevron*. EPA now downplays all of this evidence in an extended footnote that argues in favor of a fuzzy, multi-factor

analysis conducted under the rubric of "context." But that analysis identifies factors that might be relevant, at most, to *resolving* an ambiguity. *See* Pet. 28 n.16. Such considerations certainly cannot be used to *create* an ambiguity in the first place. *See* App. 43a. Moreover, if any ambiguity did exist, it would undoubtedly be resolved to EPA's disadvantage based on the persuasive evidence that Congress specifically considered and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims the *enacted* statute does. *See* App. 39a (discussing the drafting history of the 1990 amendments).

Whatever interpretation EPA may devise after taking "full opportunity" for further reflection, Pet. 21, the fact will remain that Congress replaced the pre-1990 discretionary regime of EPA ozone enforcement with a more stable, democratically-legitimate regime of *congressionally-mandated* controls. EPA may ask Congress to amend the Act, but it is not free to repeal Subpart 2, either by deeming it a "drafting error," or by invoking some insubstantial notion of "context." *See* App. 39a.

C. The Subpart 2 Ripeness/Finality Question Does Not Warrant *Certiorari*.

The remaining question EPA presents is largely contrived. EPA never argued that its Subpart 2 ruling was not final until *after* the panel had decided this issue against it. *See* App. 77a. Nor did the Agency devote more than a sentence of its court of appeals brief to its half-hearted ripeness challenge. *See id.* at 79a. Not surprisingly, the panel on rehearing summarily and unanimously rejected EPA's newfound position, App. 77a-79a, and not a single member of the *en banc* court disagreed.

1. The Subpart 2 Implementation Issues Were Included Within Other Unquestionably Final and Ripe Claims. EPA now complains loudly that the court below should have determined only whether Section 181 of Subpart 2 "precluded EPA from *promulgating* the revised standard," without ever addressing whether that section governed "how EPA could

implement the revised NAAQS." Pet. 21 (emphasis added). But that argument imagines a procedural history divorced from reality. In the actual proceedings, these two claims that EPA imagines as different were in fact one and the same claim.

EPA acknowledges, as it must, that the respondents argued before the agency that Section 181 "precluded EPA from revising the ozone NAAQS" pursuant to Section 109. Pet. 7. That argument rested on two premises: (1) what might be called the "implementation premise," the claim that section 181(a)(1) of the Act directs EPA to classify "each" nonattainment area for ozone according to the Subpart 2 categories, and (2) what might be called the "designation premise," the claim that section 107(d) requires "EPA to designate *all areas*" and requires a nonattainment designation for "*any* area that does not meet the NAAQS." J.A. (Ozone) at 3140-41. These two premises led respondents to conclude that the Act "expressly forbids downward revisions (but not upward revisions) to the 0.120 standard," *id.* at 3139, because in making such revisions, EPA would be "forced to violate the Act" – by discarding either section 181(a)(1) or section 107(d) or both.

Confronted with this argument in the agency rulemaking, EPA responded almost exclusively to the "implementation premise," arguing that Section 181 does not "prohibit[] EPA from revising the [ozone] standard" under Section 109 *because the Agency may "implement the revised [ozone] standard" outside of the Subpart 2 framework.* 62 Fed. Reg. at 38,885; *see also* EPA Ozone Br. at 67-72. Moreover, in the Court of Appeals, EPA continued to defend its authority to *promulgate* a revised standard based on its disagreement with the "implementation" premise, while implicitly contesting, but never fully discussing, the "designation" premise. *See* EPA Ozone Br. at 67-72.

To resolve this dispute, as it did, under step one of *Chevron*, the court of appeals necessarily had to bring to bear the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including analysis of the statute as a whole. Also

under *Chevron*, the court had a duty to use as a starting point the implementing agency's own construction; that is, to address the specific link in the chain of logic that the EPA itself predominately contested – the "implementation" premise. Accordingly, if EPA's ripeness and finality concerns now seem at all plausible, it is only because they emit a distorted echo of two entirely innocent facts. The court below, in addition to ruling *against* EPA on the implementation issues it *did* contest vigorously, went on to rule *in EPA's favor* on the designation issues it *failed* to contest vigorously. In addition, the court composed an opinion that presents these issues in what it considered a comprehensible order, without noting that it was bound to rule first on the implementation premise that the agency itself had used as its primary legal defense.

2. The Decision Below Is Not in Conflict With Decisions of this Court or Other Circuits. There is no support whatever for EPA's contention that the court of appeals "adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals." Pet. 10, 21. In particular, EPA's contention that this Court should accept review because the D.C. Circuit's decision "distorts" this Court's decision in *Bennett v. Spear* is mystifying. *See id.* at 22 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

Bennett merely repeats the well-established standard for administrative finality. *See* 520 U.S. at 177-78 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 113 (1948)). The Court there held that the agency ruling at issue was final because it "alter[ed] the legal regime" – even though it did *not* "conclusively determine" the plaintiffs' rights. *See Bennett*, 520 U.S. at 177, 178. As that holding suggests, the two prongs of the finality test recited in *Bennett* are not the inflexible rules that EPA makes them out to be. Rather, "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in

a pragmatic way" by taking a "flexible view of finality." *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980) (internal quotations omitted).

Here, the panel unanimously held that the Agency's Subpart 2 ruling is final because (1) it is not tentative, and (2) legal consequences flow from it. *See* App. 77a-78a. There is no sense in which that decision conflicts with *Bennett*. Rather, the most that EPA could plausibly contend is that the D.C. Circuit misapplied "a properly stated rule of law," a claim that does not supply a proper ground for *certiorari*. *See* Sup. Ct. R. 10; *Magnum*, 262 U.S. at 163.

Nor does the D.C. Circuit's decision stand in conflict with decisions of other courts of appeals. In particular, the *Dow Chemical* case highlighted by the Government holds only that statements made "while requesting certain data" prior to the initiation of an enforcement action, as well as statements made in an "amendment of [an] enforcement suit," are not final agency action. *See Dow Chem. v. EPA*, 832 F.2d 319, 324, 325 (5th Cir. 1987). The other cases cited by the Government similarly hold only that the initiation of an administrative investigation or adjudicatory process, or the announcement of an interlocutory ruling in the course of an ongoing administrative proceeding, is likewise not final. *See Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1199 (10th Cir. 1999); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 289 (5th Cir. 1999); *Hindes v. FDIC*, 137 F.3d 148, 162-63 (3d Cir. 1998). Those cases all involved truly interlocutory matters, not, like this case, a final rule, published in the *Federal Register*, and made expressly reviewable by statute. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). Moreover, the absence of any circuit split is further underscored by the fact that *Mobil Exploration* explicitly relied on D.C. Circuit precedent, *see* 180 F.3d at 1199, while *Dow Chemical* specifically distinguished as inapposite one of the very D.C. Circuit cases on which the panel below relied. *See*

832 F.2d at 325 n.35 (distinguishing *Ciba-Geigy v. EPA*, 801 F.2d 430 (D.C. Cir. 1986)); App. 77a (quoting *Ciba-Geigy*).

3. The Court of Appeals' Decision Is Correct. On the merits, EPA appears to be claiming that its Subpart 2 ruling will not be final until a revised ozone NAAQS is actually implemented and enforced in a specific area. *See* Pet. 22. In particular, EPA argues that the first prong of the finality test is not met because it has not "completed its decisonmaking process under the governing statute for the specific agency action at issue," since it "has not designated nonattainment areas, classified those areas, or set attainment dates" for those areas. *Id.* The Agency similarly contends that the second prong is not satisfied because "ATA will not be affected by EPA's views on implementation of the revised ozone NAAQS until the agency takes actual steps to implement the NAAQS by designating and classifying nonattainment areas and setting attainment dates." *Id.* at 23.

But EPA did far more in the rulemaking below than merely promulgate the revised NAAQS. Based on its "interpretation" of "the provisions of subpart 2," EPA's final ozone rule specifies the point at which Subpart 2 and the existing ozone NAAQS "will no longer apply." 62 Fed. Reg. at 38,873; *id.* at 38,894 (codifying this ruling into 40 C.F.R. § 50.9(b)). The Agency also determined, simultaneously with the ozone NAAQS revisions, how and where its new ozone NAAQS would be enforced. 62 Fed. Reg. 38,423, 38,424-27 (1997). EPA then issued three final rules revoking the existing ozone NAAQS in certain areas. *See* 64 Fed. Reg. 30,911 (June 9, 1999); 63 Fed. Reg. 39,432 (July 22, 1998); 63 Fed. Reg. 31,014 (June 5, 1998). Only after the D.C. Circuit issued its opinion in this case did EPA cease its "continu[ing] implementation efforts with respect to the 8-hour standard." 64 Fed. Reg. at 57,425.

In any event, the Government's argument against pre-implementation review "has the hollow ring of another era." *Port of Boston*, 400 U.S. at 71. Modern finality jurisprudence

has "interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). This Court has specifically rejected the "argument that [an] order lacked finality because it had no independent effect on anyone and resembled an interlocutory court order," *Port of Boston*, 400 U.S. at 70-71, and has routinely authorized pre-enforcement review of agency determinations. *See, e.g., Bell*, 461 U.S. at 779-80; *Harrison v. PPG Indus.*, 446 U.S. 578, 586 (1980) (EPA ruling final under CAA § 307(b)(1) where "[s]hort of an enforcement action, EPA has rendered its last word on the matter"); *Port of Boston*, 400 U.S.at 70-71; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 149-51 (1967) (citing cases).

As the D.C. Circuit has repeatedly held, these precedents have particularly strong force in the context of the Act. Congress has, on the face of that statute, "declared a preference for prompt review" by providing that petitions for review of EPA rulemakings must be filed "within 60 days from the date notice of such . . . action appears in the federal register." *See NRDC v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (citing CAA § 307(b)(1)) (internal quotation omitted); *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (same). The D.C. Circuit has therefore always understood EPA's general NAAQS implementation rulings (as opposed to its specific classification decisions) to be final even before they have been applied in the context of a particular state's submission of a SIP. *See NRDC*, 22 F.3d at 1133.

So has EPA. Tellingly, EPA accepted the D.C. Circuit's virtually identical ruling in *NRDC* without even petitioning for review in this Court. More telling still, in a different proceeding before the D.C. Circuit last summer, EPA argued that a separate petition for review that challenged the Agency's now-suspended implementation of the revised ozone NAAQS was precluded precisely because *this case* is the proper vehicle for resolving such challenges. In particular, EPA contended that because the

Agency's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was "resolved by the 1997 Rule" (*i.e.*, the rulemaking below), challenges to that interpretation had to be brought in *this* proceeding, not in subsequent actions challenging specific implementation decisions. *See* Br. of Resp. U.S. E.P.A. in D.C. Cir. No. 98-1363 (filed June 21, 1999), at 27-28, 29-30.

In sum, EPA would have this Court grant *certiorari* and hold its Subpart 2 ruling non-final even though (1) the D.C. Circuit had to resolve the Subpart 2 issue in the course of deciding whether EPA had authority to promulgate the revised ozone NAAQS; (2) EPA recognized as much by not disputing the finality of its ruling until after it lost in the court of appeals; (3) there is no circuit conflict for this Court to resolve; (4) this Court has long emphasized that the finality test is pragmatic and flexible; (5) EPA began implementation activities in the underlying rulemaking itself; (6) Congress expressed a desire for prompt pre-implementation review of EPA's actions under the Act; (7) multiple panels of the D.C. Circuit have long rejected EPA's contention; and (8) EPA is trying to have it both ways in order to evade judicial review altogether. There is no justification for *certiorari* in such circumstances.

EPA's ripeness challenge fails for similar reasons. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation omitted). Accordingly, this Court has consistently held EPA rulings to be fit for review where, as here, "[t]he issue presented . . . is purely legal, . . . will not be clarified by further factual development," and has had pre-enforcement effects such as those described above. *See id.* at 581; *see also EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980). Moreover, this Court has authorized pre-implementation review of a variance clause in an EPA regulation where the validity of the variance clause was intertwined with the validity of the

regulation as a whole. *See National Crushed Stone*, 449 U.S. at 72 n.12. As explained above, that is precisely the situation that the court of appeals confronted here: interpretation of Subpart 2 is intertwined with an argument made below (but not in this Court) regarding interpretation of EPA's authority to revise the ozone NAAQS. The issue was therefore ripe for review in the court below.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* on a properly formulated question which encompasses the statutory interpretation issues covered in ATA's conditional cross-petition. The Court should deny the Government's petition on the second and third questions presented, as well as all questions presented by the American Lung Association and the State Petitioners.

Respectfully submitted,

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Nos. 99-1257, 99-1263, 99-1265 and 99-1426

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

(*Case Captions Continued on Inside Cover*)

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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MASSACHUSETTS AND NEW JERSEY,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

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Cross-Petitioners,

v.

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Cross-Respondents.

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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3), whose Regulatory Studies Program ("RSP") is dedicated to advancing knowledge of administrative regulations and their impact on society.* RSP submitted comments to the Environmental Protection Agency on the proposed national ambient air quality standards for ozone and particulate matter that are the subject of the Petitions herein. Its comments focused on the inadequacy of the scientific foundation of the proposed standards and on the disproportionate risks they would impose on the general population, both because ozone provides direct health benefits that should be considered, and because the extraordinary cost of achieving the standards would adversely affect public health.

The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court.

ARGUMENT

I. INTRODUCTION AND BACKGROUND

The central issue in the petitions for a writ of certiorari filed separately by the Environmental Protection Agency

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*** Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.**

("EPA"), the American Lung Association ("ALA"), and Massachusetts and New Jersey ("States") is whether the court of appeals properly interpreted the nondelegation doctrine when it reversed and remanded the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter because EPA's interpretation of Section 109 of the Clean Air Act ("CAA") stated no "intelligible principle" on which the levels were based.

Petitioners rely primarily on three contentions to justify review. First, they argue that as a matter of public policy, the ozone and particulate matter rules are fundamentally sound and of "immense practical importance to the health of the American public." EPA Pet. 9; see State Pet. 26-28; ALA Pet. 15-17. Second, they assert that the lower "court's decision represents a radical departure from settled law respecting the nondelegation doctrine." EPA Pet. 9; see *id.* 11-19. Third, they charge that the lower court's ruling would improperly "expand the role of courts in reviewing agency action." *Id.* 9.[1]

None of Petitioners' arguments is meritorious. First, the EPA rules will not improve public health. They are

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[1] We do not address the issue raised by EPA but not by other petitioners, namely, whether EPA had taken final action and, thus, whether the Subpart 2 implementation issues were ripe for review. EPA Pet. 19-21. Contrary to the EPA petition, we believe it is clear beyond reasonable argument that the EPA's action here—"two *final* EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone," EPA Pet. 2 (emphasis added)—"alters the legal regime to which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (biological opinion isued by Fish & Wildlife Service under Endangered Species Act constitutes final agency action). The EPA rulemaking "implicate[s] the viability of massive regulatory programs which rely upon both the validity and enforceability of the revised ozone and PM NAAQS." State Pet. 26. The EPA petitioners dispute the application of the finality/ripeness tests but identify no conflict among the circuits on this issue or confusion in the criteria to be applied.

based on highly uncertain evidence and ignore important countervailing health considerations.

Second, the lower court did not misunderstand the nondelegation doctrine. It applied the doctrine in a traditional and reasonable fashion, focusing on the absence of any intelligible standard in the agency's interpretation of the CAA and identifying how the agency might construe the statute to save it from being found invalid.

Third, the appeals court did not apply the nondelegation doctrine to reverse a Congressional delegation to the EPA, nor did it, itself, reinterpret the statute to conform to its views of the constitutional norm. Instead, it took a far less intrusive approach, consistent with this Court's decision in *Chevron*, of remanding the matter to the agency for EPA to interpret the CAA consistent with the "intelligible principles" requirement of the nondelegation doctrine.

Under the Clean Air Act, EPA is to set NAAQS at levels "requisite to protect the public health" with an "adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In the case of ozone and particulate matter ("PM"), EPA's evidence suggests that there is no threshold below which either pollutant would not pose health threats. However, EPA failed to identify specific standards or measurable factors consistent with the CAA as the basis for the NAAQS levels it selected. It interpreted the CAA as allowing it to choose any point along a "linear nonthreshold" [2] continuum and to claim that the

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[2] The linear, nonthreshold dose-response model that EPA uses in its analysis relates the predicted change in health effects to a change in the concentration of PM or ozone. Unlike other chemicals regulated by EPA under this section of the CAA, EPA has no scientific evidence of a threshold concentration below which PM or ozone will not have health effects. This is the nonthreshold aspect of the model. The linear aspect of the model assumes that regard-

selected point provides an adequate margin of safety—without regard to whether that margin could be satisfied at a less stringent level.

Because the linear nonthreshold model attributes health benefits to each further reduction in ozone and PM, no matter how clean the air already may be, and without regard to the overall effect on public health, EPA's interpretation of the CAA would allow it to set the level for each at zero. It relies upon "policy judgments" to justify its selected standards. Thus, any level chosen by EPA—"any point between zero and a hair below the concentrations yielding London's Killer Fog," Pet. App. 13a—is automatically permissible under the agency's reading of the CAA because, according to EPA, the statute imposes no limits on its policy judgment.

The basic fault in EPA's misguided interpretation of the CAA, and thus of its NAAQS rules, derives from the D.C. Circuit's decision in *Lead Indus. Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), holding that § 109 of the CAA prohibits the consideration of "any factor other than 'health effects relating to pollutants in the air' " in setting NAAQS levels. *See* Pet. App. 15a. This reading of the CAA is not supported by the text, structure, context or legislative history of the Act, see ATA Cross-Pet. 14-15, or by rational policy analysis. Protecting public health necessarily involves consideration of a broad range of factors, including trade-offs between different health effects and the costs of implementing a standard, because large costs themselves can have negative public health consequences.

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less of the overall concentration of ozone or PM to which an individual is exposed, a one unit change in that concentration will have the same marginal effect.

II. EPA'S OZONE AND $PM_{2.5}$ RULES ARE LIKELY TO HARM PUBLIC HEALTH BECAUSE THEY IGNORE TRADE-OFFS AND OTHER HEALTH EFFECTS

EPA's revised NAAQS would reduce the allowed level of ground-level ozone by about 10 percent and regulate very fine particles ($PM_{2.5}$) for the first time. It argued that these revisions were necessary to protect the public from respiratory health effects, especially asthma. Contrary to EPA's assertions that these rules would make a significant contribution to public health, the standards have little scientific merit, were not endorsed by EPA's own scientific advisors, and were based on unduly narrow health considerations. EPA has presented no evidence that the new standards are achievable, and even if they were, EPA cannot demonstrate that they are likely to be more protective of public health than current NAAQS levels. In fact, the opposite is true.

For the ozone standard, EPA's Clean Air Scientific Advisory Committee ("CASAC"), a legislatively-established body of independent experts which provides advice to EPA on scientific and engineering issues, concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) Ozone JA 238. Moreover, the majority of members on the panel who expressed an opinion preferred a level less stringent than that proposed by EPA. *Id.*

Similarly for the PM standard, CASAC could find no consensus for selecting "the level, averaging time, or form of a $PM_{2.5}$ NAAQS." CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) PM JA 3162. Only 2 of the 21 scientists on CASAC were willing to

endorse a general range as stringent as the range adopted in EPA's $PM_{2.5}$ standard. *Id.* 3165.

EPA ignored other important information relevant to public health in setting the ozone and PM levels. For example, it acknowledged that, due to ozone's screening effect on harmful ultraviolet-B radiation, the reduction in ozone levels mandated by the NAAQS will increase malignant and nonmelanoma skin cancers and cataracts. EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (September 1994) (Cupitt, Larry T.) Ozone JA 3089-3104. Nonetheless, EPA ignored these data in setting the ozone standard. In uncontradicted evidence submitted to EPA, the Department of Energy projected that a 10 ppb reduction in ozone concentrations, as required by the ozone rule herein, would result in 25 to 50 new melanoma-caused fatalaties, 130-260 incidences of cutaneous melanoma, 2,000-11,000 new cases of nonmelanoma skin cancer, and 13,000 to 28,000 incidences of cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) Ozone JA 258-59. These negative health effects of the ozone standard dwarf EPA's projected positive health effects, which do not include any reduction in deaths. *See* Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare,* 17 Int'l J. of Risk Analysis 403 (August 1997).

EPA itself concedes that the costs of the new ozone regulation will far exceed its benefits, but asserts that under *Lead Industries* the agency may not consider implementation costs when setting NAAQS. *EPA Ozone Rule,* 62 Fed. Reg. 38,855, 38878 (July 18, 1997); *Regulatory Impact Analysis,* Ozone JA 2924, 2934 (July 16, 1997). Yet mounting research shows that regulatory costs do affect public health because such costs represent fore-

gone opportunities to improve health and safety—e.g., disease prevention, better diets and improved sewage treatment. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("deprivation of real income itself has adverse health effects, in the form of poorer diet, [and] more heart attacks"). Studies linking income and mortality find that every $15 million decline in incomes results in one statistical death. Randall Lutter, John F. Morrall, III, W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599 (October 1999). Applying this analytical framework to the ozone and PM rules herein, the Mercatus Center's Regulatory Studies Program estimates that full compliance could exceed $100 billion per year and increase mortality by over 6,500 deaths per year (not including the increase in melanoma deaths from UV-B exposure). *See RSP Comments in EPA Ozone/PM Rulemaking* (submitted March 12, 1997) (available at www.gmu.edu/mercatus/).

This disregard for the "wealth-health" effect is a direct result of the D.C. Circuit decision in *Lead Industries* barring consideration of costs because the CAA "makes no mention of such factors." 647 F.2d at 1149 n.37. Both EPA and the lower court interpreted *Lead Industries* as limiting the NAAQS rulemaking to direct health effects and as not permitting consideration of the costs and their relationship to benefits imposed by the rule and of whether the costs imposed by the rule will result in a net reduction in human health or a net increase in lives lost. ATA Cross Pet. 6. However, as the ATA Cross Petition shows, the ruling in *Lead Industries* is based on an erroneous reading of the CAA, has been extended improperly beyond its basis, is contrary to the principles and rationale of this Court's ruling in *Benzene* (discussed *infra* pp. 13-14), and should be reconsidered as urged by Respondents below. ATA Cross Pet. 14-18.

III. REQUIRING EPA TO IDENTIFY "INTELLIGIBLE PRINCIPLES" DERIVED FROM THE CLEAN AIR ACT IS CONSISTENT WITH ESTABLISHED PRECEDENTS

This case does not require application of the nondelegation doctrine to overturn the CAA or otherwise to interfere with broad legislative delegations of administrative authority. It also does not require that the doctrine be revised before being applied as a prophylactic canon of construction. Finally, the Court need not consider whether the CAA's defining terms—that the NAAQS standards must "protect the public health" with an "adequate margin of safety," CAA § 109(b)(1)—are unconstitutionally unconfined and therefore should be overturned.

Rather, the issue here is a narrow one. The court below limited its ruling and held only that it is the agency's responsibility to interpret the statute, if possible, in a manner that is consistent with the principles of the nondelegation rule. What the court said is that EPA is *not* free to read the CAA terms as setting virtually no definable limits on the agency's authority when setting NAAQS for ozone and PM, while ignoring a more specific construction that could provide a principled basis for the agency's rules.

We believe that the analysis applied by the court below is correct and consistent with numerous cases decided since 1935 and 1936 when the doctrine was last applied by this Court to directly invalidate a Congressional enactment. Administrative agencies are obliged to interpret their authority to avoid unchanneled delegations of discretion to the agency. To rule otherwise is to raise the specter of "delegation[s] running riot," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), and to disregard the first operative sentence of the Constitution that "[a]ll legislative

Powers herein granted shall be vested in a Congress of the United States." U.S. Constitution, Art. I, § 1; *see also id.* Art. I, § 8.

A. Under the Nondelegation Doctrine, Congressional Legislation Must Be Interpreted, If Possible, as Providing Guidance for Measuring the Limits and Lawfulness of Agency Action

The core requirement of the nondelegation doctrine is undisputed by Petitioners. EPA Pet. 13. It establishes that legislative authority delegated by Congress to the executive must state "intelligible principles," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), by which the agency is given a "primary standard" to guide its action. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see Clinton v. City of New York*, 524 U.S. 417, 484-96 (1998) (Breyer, J., dissenting). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

That the nondelegation doctrine is rarely applied to invalidate legislation does not mean that it has been abandoned or that it is without continuing substantial influence. *See South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (invalidating Indian Reorganization Act authorizing Interior Secretary to acquire lands in trust for tribes because Act provided no "intelligible principles" for determining when that authority could be exercised), *vacated & remanded on change in petitioner's position*, 519 U.S. 919, 920-23 (1996). It has an "important and continuing 'shadow' impact" on the reading and review of legislative delegations. P.

Strauss, T. Rakoff, R. Schotland & C. Farina, *Cases and Comments on Administrative Law* 92 (9th ed. 1995).

For example, in *Touby v. United States,* 500 U.S. 160 (1991), the Attorney General's broad discretion to temporarily add or remove psychoactive drugs from the "schedules" of prohibited or regulated controlled substances was upheld. In upholding this authority, however, the Court relied heavily on two concessions by the Government which more narrowly confined the Attorney General's discretion. First, it acknowledged that a drug could not be added to Schedule I (the most harmful category) without first being subject to additional testing. Second, the provision freeing temporary scheduling orders from judicial review did not preclude a defendant facing criminal charges from asserting a challenge to the temporary scheduling order as a defense to the prosecution. *See id.* 170 (Marshall, J., concurring).

Thus, the nondelegation doctrine does not mean that Congress cannot delegate broadly or allow executive agencies substantial discretion. And there are numerous examples, which Petitioners trumpet, EPA Pet. 12 n.5, of facially open-ended statutory "standards" that delegate to an agency the power to determine what are "excessive profits," "fair and equitable" prices, "just and reasonable rates," and "unfair methods of competition" which have been upheld. But in every case, the Court has identified specific limits or compelling constitutional reasons justifying the delegation before upholding the statute or rule.

What Petitioners fail to recognize is that these open-ended statutory standards have been upheld only after finding an exceptional circumstance (e.g., relying on the President's extensive war powers or authority to conduct foreign affairs) justifying the delegation or because the executive discretion was bounded by precedent, recognized principles implicit in the statute, or other similar restric-

tions. For example, *Yakus v. United States*, 321 U.S. 414 (1944) and *Lichter v. United States*, 334 U.S. 742 (1948) are emergency wartime measures where "broad discretion . . . may be essential." *Id.* 779. *Fahey v. Mallonee*, 332 U.S. 245, 249-53 (1947) upheld broad powers to oversee banking because a long history of such regulation had established specific common law standards which guided the regulators. And *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.) upheld non-wartime wage and price controls only after finding that the administrative authority was confined by price control precedents and after incorporating other restrictions including APA procedures and opportunities for judicial review in the regulatory program.

There also are even more cases where administrative action was upheld only after the Court "reinterpreted" the statute to find an implied condition limiting the facial agency authority. *E.g., Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342-43 (1974) (narrowing basis for FCC to set cable television fees); *Zemel v. Rusk*, 381 U.S. 1 (1965) (reading areas of restrictions on passports as limited by "prior administrative practice"); *Kent v. Dulles*, 357 U.S. 116 (1958) (reading passport authority narrowly to deny Secretary of State power to refuse a passport on grounds of political belief). The typical application of the nondelegation doctrine, in fact, is by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States, supra* at 374 n.7; *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222-23 (1989).

B. The Clean Air Act Could Satisfy the Nondelegation Doctrine If It Were Interpreted as Implying Limits on EPA's Authority to Set NAAQS Levels

The lower court here similarly found EPA's interpretation of the CAA inadequate because the agency had failed to find any limit on its authority to select the levels at which the ozone and PM standards were to be set. The D.C. Circuit held that § 109 and related sections of the Act must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. Finding that EPA had failed to define such a standard in the CAA, the court remanded the rules for "EPA to develop a construction of the act that satisfies this constitutional requirement." Pet. App. 4a.

The Government's Petition now claims to have found a standard in EPA's interpretation of the CAA because the Act "requires EPA to develop the [limiting substantive] 'criteria' " in accordance with established rulemaking and judicial review procedures in § 307(d), 42 U.S.C. § 7607(d), and as derived from the Act's legislative history which references "adverse effects." EPA Pet. 13-15 & n.8. However, this description of EPA's approach has no support in the record and is inconsistent with EPA's position below. This contrived effort to seek shelter under the *Benzene* ruling fails because the term "adverse" tells us nothing about the degree of harm which must be found. To say that something must be "unfavorable" or "harmful" [3] does not tell us how harmful, or that the harm must be substantial or significant. In any case, EPA's rule cannot be upheld on a view not adopted by EPA but advanced for the first time by counsel before this Court. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appel-

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[3] *Webster's New World Dictionary* 21 (College Edition 1964) (defining "adverse" as something "unfavorable, harmful").

late counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated by the agency itself.").

The situation here is closely analogous to *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion) (*Benzene*), where this Court reversed an OSHA rule issued by the Secretary of Labor that would have imposed stringent measures to minimize worker exposure to benzene, a cancer-causing chemical. According to the Court plurality, the rule could not be justified by the statutory terms requiring employers to protect their workers "to the extent feasible" from harm due to toxic substances because feasibility was not, at least on its face, a sufficiently limiting requirement. However, after reviewing the organic act, its terms and context, the plurality determined that the "feasibility" requirement was adequate because it required the Secretary to make a finding that the preexisting situation created a "significant risk" (which the OSHA rule could then alleviate). With that addition, the impermissibly standardless facial authority was held to satisfy the nondelegation doctrine. That is, the plurality narrowed the feasibility standard in the statute by interpreting it as including a significant risk test. It then remanded the matter to the agency for reconsideration of the rule under the revised interpretation of its statutory authority.[4] As here,

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[4] The *Benzene* plurality became a majority with the vote of then-Justice Rehnquist who would have invalidated the statute as an impermissible delegation. He found the statute's "to the extent feasible" standard a "mirage" and unconstitutional because Congress had delegated to the Secretary the "fundamental" policy decision of "where on the continuum of relative safety [the Secretary] should draw his line." 448 U.S. at 675, 681, 687-88. Under its interpretation of § 109 of the CAA, EPA claims the same discretion here.

however, the facially open-ended grant of authority to the agency was not upheld and the agency was afforded the opportunity to apply the corrected standard in developing its rule.

The lower court similarly remanded the rule to the agency for revision in accordance with a standard consistent with the nondelegation doctrine. However, it took a less intrusive path than that outlined in *Benzene*. It found only that, as applied, EPA's interpretation of CAA § 109 allows it untrammeled discretion that would, if not corrected, violate the nondelegation doctrine. But the court did not interpret the statute itself or tell the agency what the criteria must be under its terms. It merely held that, as interpreted by EPA, § 109 sets no limit on the agency's authority, and that under this view any level identified in the NAAQS would satisfy the CAA. Under the *Benzene* precedent, the reviewing court could have examined the statute for itself, determined its meaning (at least if it found that the intent of Congress was clear, see pp. 14-16 *infra*), and directed the agency to revise the rule in accordance with this interpretation (i.e., in a way that properly applied the reinterpreted "protect public health" with an "adequate margin of safety" test). Instead, the court below took the more limited step of remanding the matter to EPA with the direction that the agency reinterpret § 109 consistent with the nondelegation doctrine (if possible) and that under this revised understanding it identify a more specific foundation for setting the ozone and PM NAAQS.

C. Requiring the EPA to Identify the Ranking Criteria for Determining the Level of Nonthreshold Pollutants Is Consistent with *Chevron*

The ruling below that EPA, rather than the reviewing court, should determine the meaning of § 109 consistent

with the nondelegation doctrine, is also required by recognized standards for judicial review of agency action. Under *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984), courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant EPA's regulation of "stationary sources" of pollution to be measured solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify criteria consistent with Congress' intent.

The identification of the numerical equivalent or degree of an "adequate margin of safety" for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue legislative rules such as NAAQS standards. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. *See Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements are inherently "arbitrary" and involve legislative judgments which agencies are better positioned than courts to make). EPA's interpretation shall be upheld if reasonable, including therein that as interpreted the statute satisfies the nondelegation doctrine.

Enforcement of the nondelegation doctrine, to require that the NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with sound policy. Not only are agencies quasi-legislative bodies and accountable to the people through the President's authority over them, but also EPA is the body best positioned to determine what Congress intended when it approved the provisions of § 109. 467 U.S. at 865-66. In addition, under *Chevron*, the agency interpretation is not "carved in stone" and can be modified as necessary to meet changing circum-

stances. It has greater flexibility and can move more quickly to revise the interpretation of the underlying criteria when change is required. And as long as that change is plausible and justified by reasons for the change, it will not be disturbed on judicial review. *Id.* at 863-64.

IV. REVIEW OF LEGISLATIVE RULES UNDER THE "ARBITRARY AND CAPRICIOUS" TEST OF THE APA IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Finally, review of agency action under the "arbitrary and capricious" test under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is no substitute for application of the nondelegation doctrine to control standardless discretion. The nondelegation doctrine, as applied by the court of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect the public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent confines administrative discretion within understandable bounds, it will not be disturbed by the nondelegation doctrine on review. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109—it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence before the agency, and the inferences drawn from them as well as the policy rationale and ultimate conclusions must be adequately explained and justified. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, the arbitrary and capricious test does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decision making. Thus, the two requirements complement each other; but one is not a substitute for the other.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied and, alternatively, the cross-petition for a writ of certiorari should be granted.

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Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF STATE RESPONDENTS IN SUPPORT OF ATA AND CAA INDUSTRY'S CONDITIONAL CROSS-PETITIONS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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Appalachian Power Company, et al. and American Trucking Associations, Inc., et al. ("CAA Industry and ATA conditional cross-petitioners" or "conditional cross-petitioners") have submitted Conditional Cross-Petitions in this case, which arises from petitions for writ of certiorari to review *American Trucking Associations, Inc. v. U.S. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). The Conditional Cross-Petitions concern the scope of authority of the United States Environmental Protection Agency ("EPA" or "the Agency") to promulgate or revise a National Ambient Air Quality Standard ("NAAQS" or "standard") under the Clean Air Act ("CAA" or "the Act"). At issue in EPA's petition is whether the Act as construed by EPA creates an excessive delegation of rulemaking authority. The conditional cross-petitioners argue that, if the Court grants review to consider the delegation issue, the Court should also review the related question whether the statute has been properly construed to prevent EPA from considering the costs, as well as the benefits, of regulation.

Respondent States of Michigan and West Virginia oppose question one, and all three Respondent States oppose questions two and three of EPA's petition for certiorari. *See*, Respondent States' Brief in Opposition to Petitions for Certiorari. At the same time, however, Respondent States agree with conditional cross-petitioners' Conditional Cross-Petitions, urging this Court, if it grants certiorari on any of these questions, to also grant certiorari on the issue of whether EPA is authorized to consider factors other than health in setting or revising a standard under Section 109(b) of the Clean Air Act, 42 U.S.C. 7409(b); EPA App. 111a. [1]

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[1] Respondent States of Ohio, Michigan and West Virginia do not support the cross-petition of Citizens for Balanced Transport.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS

The Clean Air Act provides that the only mechanism for review of ambient air standards is to petition in the District of Columbia Circuit. CAA §307(b)(1); 42 U.S.C. 7607(b)(1). Review by this Court is, therefore, the only procedure by which to correct a long-standing erroneous decision by the District of Columbia Circuit on EPA's consideration of costs in setting ambient standards under the Clean Air Act. In addition, a correct interpretation of EPA's authority under the Act will avoid altogether the need to reach the nondelegation issue in the first question presented of EPA's petition.

The case below represents the latest in a line of cases from the D.C. Circuit, following *Lead Industries Ass'n. v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)("*Lead Industries*"), and holding that the EPA is bereft of discretion to consider the social, economic and environmental costs of, as well as the public health benefits of, a standard under Section 109. *Lead Industries* was wrongly decided, primarily because the language of Section 109 and related sections indicates that EPA has the authority to consider factors other than health when setting an air standard. Under Section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such *criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1); EPA App. 111a (emphasis supplied). The word "criteria" refers to Section 108; Section 108(a) includes a non-exclusive list of factors for setting criteria, and Section 108(b) requires EPA to collect information on cost and technological feasibility simultaneously with establishing a standard. In addition, Congress's direction in Section 109(d)(1) that EPA revise standards "as may be appropriate" in accordance with

Section 109(b) and Section 108, gives EPA discretion to consider factors such as costs. Finally, Section 109(d)(2)(c) requires an "independent scientific review committee" to advise the Administrator of any "adverse public health, welfare, social, economic or energy effects" that may result from revision of a standard. *Lead Industries* and its progeny were, therefore, wrongly decided.

In fact, the *Lead Industries* line of cases, including the case below, seemingly contradicts other cases from the District of Columbia Circuit interpreting other, similar provisions of the Act, as well as other administrative decisions. *See Michigan Department of Environmental Quality v. U.S. EPA*, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000) ("*NOx SIP call*"); *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). This Court can correct that conflict.

But perhaps most important to the Respondent States, this Court must overrule the D.C. Circuit's erroneous holding because its (and EPA's) interpretation of Section 109 potentially puts the States into an impossible box. Sections 108 and 110 of the Act, under recent D.C. Circuit decisions, *require* the States to consider economic and technological feasibility when implementing a standard for non-threshold pollutants, but the lower court's interpretation of Section 109 in this case *precludes* EPA from doing so. 175 F.3d at 1041; EPA App. 20a-21a. This interpretation creates a potential impasse between EPA and the States in implementing an air standard. The EPA, armed with complete discretion over a non-threshold pollutant and unable to consider economic or technological feasibility, could set a standard that its own data might demonstrate is realistically impossible for the States to achieve when cost and available technology are considered.

In order to resolve this impasse, if the Court grants certiorari in one or more of the petitions submitted in this case, it should also grant certiorari to the Conditional Cross-Petitions of the CAA Industry and ATA conditional cross-petitioners. In addition, the proper interpretation of Section 109 will preclude consideration of the delegation issue.

A. The Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue.

As this Court has made clear on numerous occasions, it is the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring). This case presents just such a situation. As demonstrated below, if the Court grants certiorari on the first question presented in EPA's petition, it should resolve the case by granting and resolving the issue presented in the Conditional Cross-Petitions, and avoiding the constitutional nondelegation issue presented by EPA.

The lower court correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone.[2] 175 F.3d at 1034; EPA App. 5a. It therefore correctly remanded the revised standard to the EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038; EPA App. 14a. However, in

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[2] The Respondent States focus here on the ozone standard. However, most of the statements made for ozone apply equally to the standard for coarse and fine particulate matter ($PM_{2.5}$ and PM_{10}). *See, e.g.*, 62 *Fed. Reg.* at 38,688 (July 18, 1997) (PM); 62 *Fed. Reg.* at 38,883 (July 18, 1997) (ozone); Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.

so doing, it was constrained by *Lead Industries* to deny EPA the one tool that would most help the Agency in selecting an ozone standard: cost-benefit analysis.

Ozone is a "non-threshold" pollutant; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no or few health effects are known. As the lower court stated, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034 (EPA App. 5a), citing Ozone Final Rule, 62 *Fed. Reg.* at 38,863/3 (July 18, 1997). *See also Vinyl Chloride*, 824 F.2d at 1148 (a "non-threshold" pollutant is one which "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the air standard for lead). The court below also noted that "the only concentration for ozone . . . that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034; EPA App. 6a.

In the absence of a health threshold for a pollutant, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant presents some threat to health. As the lower court stated, all the relevant variables related to health with regard to ozone "seem to range continuously from high to low." 175 F.3d at 1039; EPA App. 16a. Despite this acknowledgment, the lower court insists that EPA should be able to develop some health-based principle by which a standard can be developed. 175 F.3d at 1039; EPA App. 16a. And, also despite this acknowledgment, the lower court insists on its interpretation of Section 109(b), first articulated in *Lead Industries*, that EPA is barred from considering any factor other than health. 175 F.3d at 1038; EPA App. 14a-15a.

Ironically, the model suggested by the D.C. Circuit for EPA's use in "building blocks for a principled structure" is the Oregon plan for health care for the poor. This plan involves a ranking of treatments by a measure of the amount of improvement in health *divided by the cost of the treatment.* 175 F.3d at 1039; EPA App. 16a-17a. In other words, the principal model suggested by the lower court for EPA to follow in developing an "intelligible principle" for the ozone standard is itself a cost-benefit analysis.

Another alternative suggested by the lower court is for EPA to "report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *Id.*; EPA App. 18a. And indeed, if *Lead Industries* is correct, returning to Congress may be EPA's only legal alternative.

The interpretation of Section 109(b) of the Act suggested by EPA and supported by the lower court logically requires only one of two equally untenable results. The first is that EPA has no discretion and must set the standard for a non-threshold pollutant at zero. The second is that because no factor other than direct health effects can be considered, EPA has complete discretion to select any standard for a non-threshold pollutant. 175 F.3d at 1038; EPA App. 14a.

The first possible result of the lower court's interpretation of Section 109 for a non-threshold pollutant is both untenable and inconsistent with Congress's intent. If health is truly the only factor to be considered, then the only way to prevent any risk of direct adverse health effects is to set the standard at zero. "Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F. 3d at 1034; EPA App. 5a.

Of course, consideration of health as a criterion does not necessarily mean that the concentration chosen should be "utterly risk free." But "for EPA to pick any non-zero level it must explain the degree of imperfection permitted." 175 F.3d at 1034; EPA App. 6a. All of EPA's stated criteria are vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35; EPA App. 6a-7a, citing Ozone Final Rule, 62 *Fed. Reg.* at 38,883/2.

Aside from their vagueness, these factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health." How many deaths or adverse affects in the "sensitive population" is EPA willing to tolerate in the name of "public health"? How severe must a "health effect" be for EPA to consider it in setting a NAAQS designed to protect the "public health"? If direct health risks alone are to be considered, there simply is no principled way to draw a line, below which the effects are acceptable from a "public health" standpoint, and above which they are not. As a consequence, if factors other than direct health effects may not be considered, it is impossible to articulate or discern an intelligible principle for establishing a standard, at any level other than zero, for a non-threshold pollutant.

EPA's NAAQS determinations, as with all agency determinations, are subject to judicial review under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). CAA §307(b)(1), (d)(1), (s); 42 U.S.C. 7607(b)(1), (d)(1), (s); EPA App. 120a-21a. Under a non-zero-risk regime with direct health risk as the only criterion, EPA must pull a number out of thin air in setting a standard for ozone. As there is complete discretion in setting a standard under this theory, it is impossible for EPA to commit an abuse of discretion. This renders the standard

essentially unreviewable by the courts. Although the *Chevron* analysis is deferential to administrative agencies, it does not allow the agency complete and unreviewable discretion in its interpretation of acts of Congress.

The dilemma produced by *Lead Industries* and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine. As the ATA conditional cross-petitioners pointed out, the D.C. Circuit was bound by the *Lead Industries* precedent to preclude EPA's consideration of cost under Section 109, and the only alternative is permitting EPA a boundless (and therefore unconstitutional) discretion. This Court is not bound by *Lead Industries*, and can resolve the case without reaching the nondelegation doctrine, by construing Section 109 to permit consideration of other factors.

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS.

The lower court's decision also places the States in a potentially impossible position. Under the Act, after EPA sets a standard for a particular pollutant, each State is required to develop a state implementation plan ("SIP") for that pollutant. CAA §110; 42 U.S.C. 7410. Indeed, the State is primarily responsible for enforcing a standard. CAA §107; 42 U.S.C. 7407. EPA is required to gather and issue to the States:

> information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology.

CAA §108(b); 42 U.S.C. 7408(b). In other words, EPA is to gather and provide data to the States on the economic and technological costs of implementing the standard. The lower court has held that this provision of Section 108 does not require or allow EPA to consider costs and benefits in setting a standard. 175 F.3d at 1041; EPA App. 20a.

If this interpretation is correct, then EPA is free to set the standard for a particular pollutant without considering its cost and EPA could set a standard that in practical terms, is impossible to implement because of its costs. The States would be left "holding the bag": required to attain the standard by a specific deadline through their implementation plans, while considering costs of implementation, but faced with an arbitrarily-set and non-cost-effective standard.

This Court's review is necessary to alleviate the potential for the States to be placed in an untenable position under this regime--a regime that forces States to impose controls to abate theoretical health risks without promoting the "public health" of its population.

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.

Under Section 109(b) of the Act, the EPA is to set air standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b). Once a standard is set, the EPA must review it periodically, and revise it as appropriate under Sections 108 and 109(b).

The D.C. Circuit first considered the scope of EPA's authority with regard to the language of Section 109(b) in *Lead Industries*. In *Lead Industries*, the court reviewed the contention by petitioners in that case that the EPA was *required* by the language of the statute to consider economic and technological feasibility in setting air quality standards for lead. 647 F.2d 1148. However, the court went beyond what was necessary to decide that issue, and held that not only was EPA not *required* to consider economic and technological factors, but that it was *precluded* from doing so. 647 F.2d 1148.

The erroneous dictum has been cited on several occasions since *Lead Industries*, and indeed expanded since *Lead Industries*, to preclude EPA from using a number of factors in determining a standard. For instance, the D.C. Circuit held that in setting the standard for particulate matter, the EPA was precluded from considering the health consequences of unemployment. *National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990). In addition, the D.C. Circuit held that EPA could not consider attainability and cost justifications for ozone standards. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981). And in dicta, the D.C. Circuit stated that §109 does "not allow consideration of technological or economic feasibility." *Vinyl Chloride*, 824 F.2d at 1158-59.

The *Lead Industries* rationale was that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency was forbidden from considering it. 647 F.2d at 1148. To be sure, the courts have correctly held that where statutory language articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. For example, in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), the Court found that a provision enumerating

eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. Similarly, in *American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995), the lower court struck down EPA's decision to include the goal of ethanol market protection in its promulgation of regulations under Section 211 of the Clean Air Act, 42 U.S.C. 7545, a goal that could "possibly make air quality worse." According to the court, considering this goal as the basis for the regulation did not square with the statutory mandate to adopt performance standards that reduce pollution. And in *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit held that EPA's decision to deny a waiver based on health considerations (rather than the statutorily-required criterion of whether an additive caused or contributed to the failure of an emission control device) was impermissible. *See also NOx SIP call*, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

In contrast, broad statutory language directing EPA to adopt rules that protect the "public health" with an "adequate margin of safety," and directing EPA to revise standards as may be "appropriate," does not preclude consideration of any factor. Thus, another line of D.C. Circuit cases holds that an agency can consider costs if not expressly precluded from doing so by statutory language. For instance, in *Vinyl Chloride*, 824 F.2d at 1155, 1163, the D.C. Circuit held that Section 112, 42 U.S.C. 7412, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health, did not preclude a consideration of costs. And in *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998), the D.C. Circuit allowed EPA to consider the effects of a proposed rule on the price and supply of gasoline because there was nothing in the text or structure of the statute to preclude it. In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), the FAA was permitted to consider costs in its plan for

"substantial restoration of the natural quiet," even though costs were not mentioned in the statute. And in *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991), the D.C. Circuit allowed EPA to use a cost-benefit analysis in determining whether fugitive dust from coal mines should count in identifying "major" contributors to "significant deterioration" under Sections 160 *et seq.*, despite the lack of statutory language mentioning costs. As the D.C. Circuit observed only this month in *NOx SIP call*, 2000 U.S. App. LEXIS 3209 at *36-40, "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction."[3]

Therefore, in contradiction to the rationale in the *Lead Industries* line of cases, the rationale in *Vinyl Chloride* and similar cases is that where Congress does not enact statutory language that precludes it, and where Congress in fact enacts statutory language (*e.g.*, "ample margin of safety") that opens the door to cost considerations, an administrative agency can consider cost. And where an agency is confronted with cost arguments, and it has discretion to consider them, it cannot lawfully ignore them. Indeed, there is no principled reason why Section 109(b) cannot be analyzed under *Vinyl Chloride* and similar cases, rather than under the erroneous *Lead Industries* test. Several of the cited cases involve similar statutory structures: "a mandate directed to some environmental benefit," "phrased in general quantitative terms," "and contain[ing] not a word alluding to non-health trade-offs." Section 109 fits comfortably into this structure. The language at issue in Section 109 is as follows:

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[3] Respondent States were among those who challenged EPA's *NOx SIP call* rule by asserting, among other claims, that costs were inappropriately considered in the determination of significant contribution.

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety*, are requisite to protect the public health.

42 U.S.C. 7409(b)(1)(emphasis added); EPA App. 111a. The examples of mandates "phrased in general quantitative terms" given by the court in *NOx SIP call* include "ample margin of safety," "substantial restoration" and "major." The mandate in Section 109(b), "an adequate margin of safety," is virtually identical to "ample margin of safety" cited by the D.C. Circuit in *NOx SIP call* and analyzed by that court in *Vinyl Chloride*. Like *Vinyl Chloride* and similar cases, Section 109(b) itself does not, on its face, preclude consideration of factors other than health. Therefore, under the rationale of *Vinyl Chloride* and similar cases, Section 109(b) allows EPA to consider cost in setting a standard, because Congress has not expressly forbidden it, while under the rationale of *Lead Industries* and progeny, Section 109(b) precludes EPA from considering cost in setting a standard because Congress does not expressly allow it.

Lead Industries simply cannot be reconciled with the *Vinyl Chloride* line of cases regarding the authority of an administrative agency to consider a factor not expressly mentioned in the statutory language. Given the D.C. Circuit's reluctance to overturn *Lead Industries*, or otherwise reconcile its own jurisprudence, and the potential for avoiding the nondelegation issue, this conflict should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Conditional Cross-Petitions if it grants certiorari on any form of the first question presented in EPA's petition.

Respectfully submitted,

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In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

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STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

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[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation.* Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation.*

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-

hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

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[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

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Nos. 99-1257, 99-1265

In The
Supreme Court of the United States

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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RESPONSE OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR CERTIORARI BY THE SOLICITOR GENERAL AND THE AMERICAN LUNG ASSOCIATION

Respondents Massachusetts and New Jersey support the petitions of the Solicitor General and the American Lung Association for a writ of certiorari to review the court of appeals' rulings with respect to the nondelegation doctrine and the implementation of the new eight-hour national ambient air quality standards for ozone. Respondents have filed their own petition for certiorari concerning those rulings. *Commonwealth of Massachusetts v. American Trucking Assns.*, No. 99-1263.

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Nos. 99-1257, 99-1263, 99-1265

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR RESPONDENTS NATIONAL STONE ASSOCIATION AND KENNECOTT HOLDINGS CORPORATION, *ET AL.*

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PARTIES TO THE PROCEEDINGS

This Brief is filed on behalf of Respondents National Stone Association, Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company. These Respondents were Petitioners in the consolidated cases addressed by the Petitions for a Writ of Certiorari to which this Brief responds, *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases). A complete list of the other parties to the proceedings below is provided in the Brief in Response for the Respondents Appalachian Power Co., et al.

RULE 29.6 DISCLOSURE STATEMENT

1. Respondent National Stone Association (NSA) is a national trade association representing the interests and concerns of the aggregates industry. NSA has not issued shares or debt securities to the public. NSA includes over 700 member companies, which account for approximately 90% of the annual U.S. production of crushed stone and approximately 70% of U.S. sand and gravel production.

2. Respondents Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company have not issued shares or debt securities to the public.

3. Rio Tinto plc, the indirect parent of the Kennecott companies listed above, is a company incorporated under the laws of the United Kingdom, whose shares are publicly traded in the United States in the form of American Depository Receipts. The principal market for Rio Tinto PLC ordinary shares is the London Stock Exchange, with ordinary shares also listed on the Amsterdam, Brussels, Frankfurt, Paris and Swiss Exchanges. Rio Tinto's principal business is mining.

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INTRODUCTION

This Brief responds to the various Petitions for a Writ of Certiorari on portions of the Court of Appeals' decision in *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). These Respondents are interested primarily in the "nondelegation" decision below with respect to the national ambient air quality standards for fine particulate matter (PM-2.5). They concur generally in the Brief filed by Respondents Appalachian Power Co., et al., and join those Respondents in urging the Court to deny certiorari on the "nondelegation" issue and others presented in this case. The purpose of this Brief is to provide the Court with additional legal and factual support for the decision of the Court of Appeals with respect to the fine particle standards.[1]

I. THE FINE PARTICLE RECORD AMPLY SUPPORTS THE "NONDELEGATION" HOLDING

In EPA's Petition, the brief discussions of the basis for the fine particle standards focus exclusively on the agency's decision that the prior standards did not provide adequate protection. EPA Pet. 5, 11. Even that decision was subject to considerable scientific uncertainty, as EPA discussed in the preamble to the final rules.[2] Beyond that,

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[1] In the decision on rehearing below, the Court of Appeals indicated that it would defer to EPA's response to the "nondelegation" holding under this Court's opinion in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). EPA App. 75a-76a. Respondents note this Court's recent confirmation that under *Chevron*, the first inquiry is whether Congress has spoken to the question at issue; if so, the court must effect the unambiguous intent of Congress. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. —— (2000). As discussed below, Congress has expressed its intent unambiguously in this case; EPA simply failed to follow it.

[2] *See* 62 Fed. Reg. 38,655-657 (1997). The agency's scientific advisors found that the relevant studies "provide ample reason to be concerned," but also urged that the studies "should be interpreted cautiously" as a result of the various uncertainties (62 Fed.

however, the effect of the scientific uncertainties was greatly magnified in the subsequent decision as to the level at which the new standards would be set. At that point, it was simply not possible to choose the concentration levels based on the science alone. Faced with widespread scientific uncertainty, EPA not only failed to articulate an intelligible principle to govern its decision, but expressly rejected the principle that Congress intended to be applied.

EPA's discussion of the concentration levels for the fine particle standards is a remarkable combination of rejected options and conclusory explanations for the chosen approach.[3] In attempting to justify the chosen standards, EPA stated that the agency:

- sought "the requisite reduction of risk;"
- made "decisions on standard levels that would reduce risk sufficiently to protect public health with an adequate margin of safety;"
- adopted a "balanced view of the strengths and uncertainties of the scientific information that reflects the intermediate approach;"
- "accurately reflected the bases for divergent views;"
- rejected fine particle protection equivalent to the prior PM-10 protection;

Reg. 38,656, col. 3). Accordingly, the Administration delayed implementation until after the first five-year review of the standards, in the hope that pending research would provide some answers. *See* 62 Fed. Reg. 38,421 (1997) (Presidential Memorandum). Congress ultimately ratified the President's decision. *See* Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a. Thus, EPA's assertion that the decision below "unnecessarily prolongs the exposure of millions of Americans to unhealthy pollutant levels" seems somewhat disingenuous. EPA Pet. 11.

[3] The following bullets and quotations are taken from the agency's discussion of the concentration levels at 62 Fed. Reg. 38,674-677 (1997).

- rejected "uncertain ratios" to the prior PM-10 standards;
- opted for "appropriately protective" standards;
- acknowledged great "scientific uncertainties" in the available health studies;
- considered the combined effects of the annual and 24-hour standards, the cumulative scientific uncertainties, the levels recommended by EPA staff and the science advisors, and public comments.

Yet nowhere, throughout this entire lengthy and complex explanation, is there *any* discussion whatsoever of the level of "risk reduction" that is "requisite," the level of protection that is "appropriate" or the criteria to be used in making these decisions in the face of extremely uncertain health studies.

There was no consensus among the agency's science advisors on these questions, given "the many unanswered questions and uncertainties . . ."[4] The scientific data gaps also were demonstrated clearly in the agency's unsuccessful attempts to prepare a reliable quantitative risk assessment for the standards. When entered into various risk assessment models, the data available from the underlying health studies were simply not sufficient to support a robust and reasonably reliable estimate of the risk reduction—if any—that the new standards would provide.[5] As a computer data analyst might say, "garbage in, garbage

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[4] Letter from Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Hon. Carol M. Browner (June 18, 1996), PMJA 3167.

[5] For a detailed discussion of the uncertainties inherent in the risk assessment, see Abt Associates, "A Particulate Matter Risk Analysis for Philadelphia and Los Angeles," prepared for U.S. EPA, OAQPS, pp. 129-136 (July 3, 1996). EPA Docket No. A-95-54, R.Doc.II-A-11.

out." In the final analysis, EPA did not place "great weight" on the various risk assessments, concluding that they "include significant uncertainty and, therefore, should not be viewed as demonstrated health impacts." [6] Leaving no doubt as to the minimal role of risk assessment in EPA's decision, EPA's Opening Brief in the Court of Appeals stated:

> [T]he risk assessment was not a "central justification" of the PM-2.5 levels . . . Indeed, EPA cautioned against using the risk assessment in this case as a precise measure of risk due to the limitations and uncertainties in the current state of the evidence. Thus, the risk assessment was not "central" to EPA's quantitative task of selecting the PM-2.5 levels.[7]

Denied the essential tool of a reliable risk assessment, EPA simply gazed into its crystal ball and picked a number somewhere in between the various diverging views.

This is precisely the approach to ambient standards that Congress and the courts have sought to prevent. In amending the standard-setting provisions in the Clean Air Act in 1977, Congress intended for EPA to assess risk, but also cautioned:

> [o]n the other hand, the committee does not intend this language as a license for "crystal ball" speculation. The Administrator's judgment must of course, remain subject to restraints of reasoned decisionmaking.[8]

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[6] 63 Fed. Reg. 38,665 (col. 1), 38,656 (col. 2) (1997).

[7] Brief for Respondent United States Environmental Protection Agency at 75, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1440 and consolidated cases) (filed August 5, 1998).

[8] H.R. Rep. No. 294, 95th Cong., 1st Sess. 51 (1977) (hereinafter "1977 Houe Rept."). The approach adopted by the House Com-

As a check on EPA's authority to adopt standards in the face of scientific uncertainty, Congress required the agency to demonstrate that standards are necessary to protect against significant public health risks. The House Committee expressly endorsed the opinion in *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976), which holds that EPA may set standards only when necessary to prevent "a significant risk of harm."[9] In several places, the House Report makes it clear that standards are to address only "significant risk," not *any* risk.[10]

Further, this Court has indicated that the inability to justify public health regulation through scientifically sound quantitative risk assessment poses serious constitutional problems. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"), the Court rejected an OSHA attempt to establish a health standard for benzene without demonstrating that

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mittee eventually was accepted in conference and written into the Act. *See* H.R. Rep. 564, 95th Cong., 1st Sess. 184 (1977) (Conference Report); *see also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (remanding sulfur oxides secondary standard "for the Administrator to . . . enlighten the court as to the basis on which he reached the . . . standard from the material in the Criteria"); *accord, NRDC v. EPA*, 902 F.2d 962, 968, 971 (D.C. Cir. 1990) (court obligated to "carefully review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence"); *Lead Industries Association v. EPA*, 647 F.2d 1130, 1146-47 (D.C. Cir. 1980) (factual conclusions capable of being drawn from the evidence in the record must be supported by "substantial evidence in the record considered as a whole"; where scientific knowledge insufficient to permit fully informed factual determinations, court "will indeed scrutinize such judgments carefully" and EPA must provide a reasoned explanation "calculated to negate the dangers of arbitrariness and irrationality"); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (same).

[9] *See* 1977 House Rept. at 43.

[10] See, e.g., 1977 House Rept. at 43, 45, 46, 47, 48.

the standard was necessary to protect against "a significant risk of harm" (448 U.S at 645). The Court noted that in the absence of a clear statutory mandate, it is unreasonable to assume that Congress intended to grant OSHA the "unprecedented power over American industry" conferred by regulation in the absence of a requirement to demonstrate significant risk (*id.*) The court also explained that "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit" (448 U.S. at 645). The Court then stated:

> [i]f the Government was correct in arguing that neither [applicable statute] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be avoided (448 U.S. at 646).

This case presents precisely the same scenario. Key scientific uncertainties made it impossible to quantify potential risk sufficiently to characterize it as significant for purposes of choosing the fine particle concentration limits. As a result, EPA was forced to abandon the "intelligible principle" of regulation based on significant risk, resorting to an arbitrary selection of standards from among widely divergent scientific views. No criteria for choosing a standard in the face of this scientific uncertainty were articulated, nor was any other rational basis provided for the numbers that EPA picked. In a reaction similar to this Court's decision in *Benzene*, the Court of Appeals found EPA's approach so arbitrary as to render

the underlying delegation of legislative authority unconstitutional. The court's holding is amply supported by the fine particle record. It is also fully consistent with the governing statute and the relevant decisions of this Court, for reasons to which we now turn.

II. THE "NONDELEGATION" HOLDING IS SUPPORTED BY THE GOVERNING STATUTE AND THE DECISIONS OF THIS COURT

EPA argues that the decision of the Court of Appeals "would unjustifiably expand the role of the courts in reviewing agency action," and "would effectively supplant the concept that courts review agency determinations based on an arbitrary and capricious standard." EPA Pet. 9, 17. But these arguments focus on only one part of the applicable standard of review. Clean Air Act Section 307(d)(9) (42 U.S.C. § 7607(d)(9)), which governs judicial review in this case, provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be:
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) *contrary to constitutional right, power, privilege or immunity*;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
>
> (D) without observance of procedure required by law . . . (emphasis added).

Far from assuming an unjustifiably expanded role, the court was fulfilling exactly the role that Congress intended.[11] In the view of these Respondents, the rule-

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[11] In adopting the 1977 standard-setting amendments, Congress was careful "to provide for adequate judicial review of the reasonableness of the Administrator's judgment in assessing risks,"

making record would have supported a remand of the fine particle standards under any of at least the first three provisions of this standard. The fact that the court chose to base its holding on constitutional grounds simply underscores the extremely arbitrary nature of EPA's decision.

Nor is there any basis for EPA's assertions that the court's ruling conflicts with this Court's nondelegation decisions. As discussed above, the court's ruling is fully consistent with this Court's decision in *Benzene*.[12] Further, EPA's argument that the starting point for a nondelegation analysis should be the statutory language, purpose and history is precisely the point. EPA Pet. 12. As this Court has noted, agencies are to "derive meaningful content" from these factors, which provide "a veritable code of rules . . . for the [agency] to follow in giving effect to [the statute]. *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946). Judicial review "safeguards against statutory or constitutional excesses," and "all that can be required is that the [agency's] actions conform to the statutory language and policy" (329 U.S. at 106). But where—as here—the agency expressly rejects the "intelligible principle" provided by Congress to govern its decision, and fails to provide a reasonable explanation of how it applied the statute and the underlying policy to derive the standards it chose, the effect is to create an

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in the form of the judicial review provision in Section 307(d). 1977 House Rept. at 50. The same statutory language appears in the judicial review provision of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2) (1999). Indeed, the "arbitrary and capricious" standard itself finds its roots in the Due Process Clause. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934).

12 *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (citing *Benzene*) (cases since the Depression confined to "giving narrow interpretations to statutory delegations that might otherwise be thought to be unconstitutional").

unconstitutional delegation. That is all the Court of Appeals held in this case, and its holding is amply justified by the fine particle record and the applicable legal principles expressed by this Court.

CONCLUSION

Congress directed EPA to base ambient air quality standards on significant public health risks. This Court has held that in such cases, the inability to quantify potential risk sufficiently to characterize it as significant raises serious constitutional concerns under the "nondelegation" doctrine. Unable to quantify potential risk owing to severe scientific deficiencies, EPA chose to reject these principles and establish fine particle standards without articulating any other governing criterion. The Court of Appeals found EPA's approach so arbitrary as to effect an unconstitutional delegation of legislative authority. The court's decision is entirely consistent with the record in decisions of this Court. The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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Nos. 99-1257, 99-1263, 99-1265

IN THE
SUPREME COURT OF THE UNITED STATES

Carol. M. Browner, Administrator of the
United States Environmental Protection Agency, *et al.*,
Petitioners

v.

American Trucking Associations, Inc., *et al.*,
Respondents/Cross-Petitioners

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF FOR THE MANUFACTURERS ALLIANCE/MAPI INC. IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*

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To The United States Court Of Appeals
For The District Of Columbia Circuit

AMICUS CURIAE BRIEF FOR THE MANUFACTURERS ALLIANCE/MAPI INC.[1]

INTEREST OF AMICUS CURIAE[2]

The Manufacturers Alliance/MAPI Inc. ("MAPI") is organized as a nonprofit research and educational institution, as defined in the Internal Revenue Code, 26 U.S.C. §501(c)(6), and is supported today by some 450 manufacturing companies. MAPI also operates the Institute for Technological Advancement, a nonprofit research and educational institution as defined under Section 501(c)(3) of the Internal Revenue Code. MAPI owes its existence in its present form to the Court's decision in *A.L.A. Schechter*

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[1] Pursuant to Supreme Court Rule 37.6, in addition to Counsel identified on the cover, Brian Mannix, MAPI's Director of Science and Technology Studies, participated in authoring this brief. No entity other than MAPI provided financial support for this brief.

[2] The consent of the parties to the filing of the *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

Poultry Corp. v. United States, 295 U.S. 495 (1935) ("*Schechter Poultry*").

MAPI was originally organized as the Machinery and Allied Products Institute, an "industry association" under the National Industrial Recovery Act of 1933 ("NIRA"), for the purpose of drafting a "code of fair competition" for corporations in SIC Code 35, Machinery and Allied Products. The economic philosophy underlying NIRA – that the nation suffered from excess investment in productive capacity and would benefit from government-imposed restraints on competition and on new capital investment – was anathema to manufacturers of machinery and equipment. NIRA's direct restrictions on the purchase of new machinery was particularly troubling to members of SIC Code 35.

Thus, far from embracing its role as a "co-delegatee" with the National Recovery Administration, MAPI's founders recoiled from the code-development tasks they were directed to undertake. From its origin, MAPI was charged by its members with developing public policy arguments in support of economic expansion, technological innovation, and productivity growth, and in opposition to detrimental government restraints on capital investment.

After the Court vacated NIRA in *Schechter Poultry*, MAPI turned its energies to its research and education mission, which continues today. The petition and cross-petitions now before the Court involve MAPI's longstanding interest in the nondelegation doctrine as well as its longstanding opposition to broad governmental restrictions on economic growth and technological innovation.

Of particular interest to MAPI members are the sorts of restrictions on new capital investment that are typically imposed under the Clean Air Act within areas designated as "nonattainment" with respect to the ozone and particulate matter National Ambient Air Quality Standards ("NAAQS") at issue in this case. Just as such capital investment restrictions were not economically beneficial in 1935, they are not environmentally beneficial in 2000.

Among MAPI's members are the developers and producers of catalytic converters, fuel injectors, air bags, advanced power generation systems, gas turbines, and many other technologies that improve our lives in myriad ways. The members of MAPI are proud of the contributions they make to safety, fuel economy, and a cleaner environment, and they know that these desiderata do not flow from the tip of the regulator's pen. In its comments on the Office of Management and Budget's 1998 draft Report to Congress on the Costs and Benefits of Federal Regulations MAPI noted:

> Automobile manufacturers and their suppliers devote considerable resources to improving vehicle safety. The benefits NHTSA attributes to its regulation are, in fact, returns on the investment made by manufacturers. The people who work in product and materials research, manufacturing, quality systems, and even – perhaps especially – marketing, like to think that their efforts and their resourcefulness have contributed to the safety of modern cars. The same is also true for environmental benefits and other categories of regulatory benefits – rule writers may have helped, but they did not accomplish all these things on their own.

The substantial progress that has been made in safety and environmental quality over the past 65 years is the product of hard work, creativity, innovation, and capital investment.

Blanket restrictions on new capital investment are a blunt instrument for cleaning the air, and one that was intended to be used only as a temporary measure and only in isolated problem spots. Notwithstanding the demonstrable progress that has been made in air quality, EPA's revised NAAQS would perpetuate and dramatically expand the geographic scope of the nonattainment regulatory regime. The result will be very serious adverse consequences for our nation's economic prosperity, and no or even negative benefits for our environment.

SUMMARY OF ARGUMENT

The delegation of legislative authority in Section 109 of the Clean Air Act – as EPA would interpret it – is as broad, costly, standardless, and as inimical of political accountability as any comparable regulatory delegation since NIRA. Moreover, the delegation issue in this case is likely to recur with more regularity, because of dynamic developments in scientific knowledge and technology. The new paradigmatic case features: (1) a broad delegation to an agency; (2) profound changes in facts, science, or technology; (3) that were not directly addressed by Congress and (4) for which Congress made no administrative provision. Under these circumstances an intelligible principle in the original legislative delegation may no longer provide a meaningful guide to administrative action. This is just such a case.

"[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). MAPI respectfully submits that the Court can mitigate these enforcement difficulties by granting *certiorari* and reaffirming that: (a) only Congress may "establish [or expand] the standard of legal obligation" in the Clean Air Act; (b) both courts and agencies should utilize a narrow rule of construction for nondelegation cases such as this; (c) courts should give greater latitude to forms of delegation that provide a "balancing" principle for administrative action; and (d) a judicial preference for vacating rules rather than statutes is a reasonable and practical way to enforce the constitutional separation between the two political branches without wreaking unnecessary havoc on legislative and administrative processes.

ARGUMENT

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BENZENE* FOR THE COURT TO CLARIFY THE LIMITS OF AGENCY DISCRETION WHEN CONGRESS DELEGATES BROAD POWER OVER THE U.S. ECONOMY, BUT FAILS TO PROVIDE AN "INTELLIGIBLE PRINCIPLE" THAT ENCOMPASSES THE AGENCY'S ACTION.

We agree with petitioner EPA and cross-petitioners ATA, *et al.*, that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). We do not agree with petitioner EPA, however, that *certiorari* is warranted because the D.C. Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Contrary to EPA's assertion, the decision of the Court of Appeals is not a "radical departure from settled law;" but it does, as EPA points out, "raise[] questions respecting the constitutionality of a broad range of federal statutes requiring agencies to draw lines based on scientific judgments." EPA Petition at 9.

The Court of Appeals correctly recognized the vast delegation created by EPA's interpretation of its authority under Section 109 of the Clean Air Act. Citing *Schechter Poultry*, it noted that a "more precise" delegation is required because "the standards in question affect the whole economy." 175 F.3d at 1037. Moreover, the Court of Appeals found that the breadth of the delegation significantly exceeded another regulatory statute with a more focused reach on the U.S. economy where the Court of Appeals had found it necessary to fashion "intelligible principles" to constrain the agency's legislative discretion, *id.*, citing *International Union, UAW v. OSHA (Lockout/Tagout I)*, 938 F.2d 1310 (D.C. Cir. 1991) (discretion to "do nothing at all"

or "take the industry to the brink of ruin," with "all positions in between" would be unconstitutional). *Id.* Here, EPA's discretion runs from doing "close to nothing at all" to "send[ing] industry not just to the brink of ruin but hurtling over it," *Id.* Nor are there any "special theories," such as the war powers of the President, to justify an excessive delegation. *Id.*

In the years since *Schechter Poultry*, the nondelegation doctrine has continued to serve as one of the bulwarks of the constitutional separation of powers. This brief addresses the respective authorities and responsibilities of the three Branches of Government in this type of case. It also addresses other questions raised by petitioners and respondents to the extent that they bear on the meaning and application of the nondelegation doctrine.

A. The Court Should Grant *Certiorari* To Clarify The Application Of The Nondelegation Doctrine To Agency Policy Decisions That Profoundly Affect The Economy And Are Motivated By New (And Contested) Scientific Findings That Congress Neither Foresaw Nor Provided For.

The Court should grant *certiorari* not to reverse the decision of the Court of Appeals, which MAPI believes was essentially correct, but to provide guidance to agencies and reviewing courts as to the application of the nondelegation doctrine to the Clean Air Act and in similar contexts.

This case presents the question of what role the Court's nondelegation doctrine plays where advances in scientific knowledge or technology create a chasm between the factual context that an agency believes it is operating in and the factual context of the original legislation. By altering the meaning of even simple words like "safe" or "zero,"

scientific progress has the potential to render legislative decisions unrecognizable to those who made them.[3]

MAPI respectfully urges the Court to use this opportunity to clarify the proper role the nondelegation doctrine plays in reviewing broad congressional delegations of authority applied to facts that change as science and technology evolve. Twenty years have passed since this Court's decision in. *Industrial Union Dep't v. American Petroleum Institute,* 448 U.S. 607 (1980) (*"Benzene"*). Considering the vast reach of federal regulatory activities today, and the dramatic increase in health, safety, and environmental regulation grounded in scientific judgments, further guidance from the Court on the limits of delegation is necessary and timely.

This Court should grant *certiorari* in order to reaffirm that only Congress may "establish [or expand] the standards of legal obligation" (*Schechter Poultry*, 295 U.S. at 530) imposed in the Clean Air Act, and to provide guidance to EPA, to other Executive agencies, and to all reviewing courts as to their respective responsibilities where an "intelligible principle" is no longer apparent in the legislative delegation because of a change in facts, science, or technology, which Congress neither addressed nor foresaw.

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[3] *See* Randall Lutter and Christopher DeMuth, "Ozone and the Constitution at EPA" American Enterprise Institute (July 1999) at 2 ("But whatever its fate on further appeal or in subsequent cases, the decision has revealed a serious problem at the heart of our environmental laws. The problem is not simply a matter of executive-branch usurpation or legislative-branch abdication; it is inherent in the tension between rigid legislation and fluid science.").

B. The Court Should Grant *Certiorari* To Affirm That The Court Of Appeals Properly Rejected EPA's Interpretation Of Section 109 Of The Clean Air Act As Lacking Any "Intelligible Principle."

The Court of Appeals noted several "intelligible principles" that theoretically could have guided EPA's discretion in its administration of delegated legislative authority, including some that are often used under health/risk regulatory regimes, *e.g.*, cost-benefit analysis, zero-risk, and generic unit of harm. 175 F.3d at 1038-40. However, both EPA and the Court of Appeals believe that cost consideration has been unavailable since *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

With respect to the Clean Air Act, we agree with industry cross-petitioners that this Court's review should encompass current D.C. Circuit case law that reads Section 109 of the Clean Air Act as precluding EPA from considering cost or technological feasibility. We suspect that considerations of cost do in fact influence EPA's thinking, and there is some evidence to that effect in the record. *See* ATA Conditional Cross-Petition, at 37-38 (citing EPA's "soft" $10,000 per ton of emissions reductions compliance-cost cap). We agree with and incorporate by reference cross-petitioners compelling argument that the real culprit here is a wrongly decided *Lead Industries*, especially in light of *Benzene*, *INS v. Chadha*, 462 U.S. 919 (1983), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *See* ATA Conditional Cross-Petition at 15-26. Therefore, we agree with the cross-petitioners' reformulation of the question to be presented: "Whether the Clean Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors 'other than health effects relating to pollutants in the air,' given that considerations of such factors would permit both the Agency and reviewing courts

to avoid confronting constitutional nondelegation issues." ATA Conditional Cross-Petition at 2-3.

II. THE COURT CAN AND SHOULD USE THIS CASE TO SETTLE THE PROPER APPLICATION OF THE NONDELEGATION DOCTRINE AND TO SORT OUT THE ROLE OF ALL THREE BRANCHES OF GOVERNMENT IN ADAPTING LAWS TO CHANGING FACTS.

The proceedings below reveal not only a statutory delegation of legislative authority "not canalized within banks that keep it from overflowing." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring), but an urgent need for this Court to update its guidance for lower court navigation of hitherto uncharted nondelegation waters. The basic doctrine remains intact. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, No. 98-1152, 529 U.S. –, ("*Brown & Williamson*"), slip op. at 39 ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."). But its application is subject to widespread dispute. *See* 195 F.3d at 15 (Silberman, J., dissenting from denial of rehearing en banc) ("The panel, purporting to rely on interpretation . . . . By so doing I believe the panel undermines the purpose of the nondelegation doctrine.") Clearer instruction from this Court would dispel much of the prevailing confusion. *See* Benjamin Cardozo, *The Nature of the Judicial Process* 178 (1921) ("Little by little the old doctrine is undermined. . . . Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.").

Nondelegation decisions in 1935 invalidated Acts of Congress as unconstitutional; today nondelegation is typically combined with the doctrine of constitutional avoidance to provide rules of statutory construction. *See*

Mistretta, 488 U.S. at 371-74 & n.7 (reviewing cases). The underlying principle – legislative accountability – remains unchanged. But the roles of the actors need clarification.

A. The Court Should Update and Refocus the Nondelegation Doctrine on Accountability By Reaffirming A Narrow Rule Of Construction.

The constitutional basis for the nondelegation doctrine, Article I, section 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."), both empowers and constrains the Legislature. As the Court explained in *Schechter Poultry*, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." 295 U.S. at 529. But this provision also constrains the other two branches: neither the Judiciary nor the Executive may legislate on its own authority and initiative, *i.e.*, without an "intelligible principle" having been first laid down by Congress. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

On rare occasions a statute will violate the nondelegation doctrine on its face – NIRA was such a case – because it displays "delegation running riot." *Schechter Poultry*, 295 U.S. at 553 (Cardozo, J., concurring). More often, the combination of a statute's breadth and its ambiguity does not raise a question as to the constitutionality of its delegated authority until an agency attempts to interpret and apply the statute in a concrete setting.

MAPI respectfully submits that the inherent difficulty in enforcing the nondelegation doctrine (*see Mistretta*, *supra*), would be mitigated if the Court were to grant *certiorari* and reaffirm both a narrow rule of construction in cases such as this and the Court's own preference for vacating rules rather than statutes as a reasonable and practical way to enforce the constitutional separation of

powers between the two political Branches without wreaking unnecessary havoc on legislative and administrative processes.

When nondelegation raises questions about the constitutionality of a legislative enactment, both the agency and the reviewing court have an obligation to construe the statutory delegation of authority narrowly. *Cf. United States v. Heth*, 3 Cranch 399, 413 (1806)(Paterson, J.) ("[T]he words of a statute, if dubious, ought . . . to be taken most strongly against the law-makers."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part)("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").

Of course, when the consequences of an agency's rulemaking are massive, any interpretation of an agency's statutory authority "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson*, slip op. at 10.

If the agency is unable to identify an intelligible principle adequate to sustain its regulation, the reviewing court must decide whether to vacate the enactment of the Legislature or the action of the Executive. This Court consistently has preferred the latter as a less drastic remedy. *See Mistretta*, 488 U.S. at 373 n.7 (citing *Benzene*, 448 U.S. at 646; *National Cable Television Assn. v. United States*, 415 U.S. 336 (1974)).

A remand to the administrative agency, such as the Court of Appeals ordered in this case, should be viewed neither as an appeal to the Executive's dispassionate expertise in statutory interpretation nor as an attempt to salvage a foundering statute. Rather, it is simply the most practical way for courts to resolve a conflict between ambiguous legislative authority and a particular agency regulation. This "no-fault" remand should not be thought of

as a "weak form" of the nondelegation doctrine, since the riot gear (overturning the statute) is still available for cases where it is needed.

It is not an unreasonable burden to require an agency either to explain the basis and scope of its discretion or, in the event that its authority is found wanting in the light of new science or technology, to propose a legislative expansion of its authority. The alternative – to permit an agency effectively to amend the statute in view of new science – while perhaps expedient, is constitutionally impermissible.

B. When Congress Delegates Broad Authority, It Should Include Limiting Principles That Are Both Intelligible and Durable.

This Court has long recognized the need for Congress to be able to delegate broad authority to an administrative agency. "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directions." *Mistretta*, 488 U.S. at 372.

But the Court is right to insist that such delegations be accompanied by an intelligible principle to guide the agency's exercise of discretion, in order to preserve the chain of political accountability between the Congress and the consequences of its legislative acts. Where governmental actions require difficult tradeoffs, it is essential that they be exposed to the discipline of political debate and democratic choice.

Congress does not fully discharge its duty merely by voting for good science, public safety, and a clean environment, without giving attention to the means by which statutory goals are achieved and to the range of consequences they may entail. Congress must not only "delineate[] the

general policy" an agency is to apply, it must also set "the boundaries of this delegated authority." *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946).

We argue (supra) that these statutory boundaries should be construed narrowly against a background of changing science. But a principle of narrow construction need not interfere with valid Congressional delegations of authority, as long as the statute makes an appropriate provision for taking new information into account.

For instance, an intelligible principle that requires an administrative agency to balance the beneficial and harmful consequences of its actions is one that can accommodate a wide variety of factual circumstances and changing scientific understandings, without becoming impermissibly broad or vague.[4] It conveys the authority to take a range of actions in response to new information, but it harnesses that authority to a principle that is versatile without being vagrant. It permits the agency to cause harms or to impose substantial costs and obligations – even if they go far beyond what was anticipated by Congress – but only to the extent that they are warranted by a commensurate advancement of statutory objectives.

In contrast, a statutory principle that requires an administrative agency to ignore the harmful consequences of its actions – such as EPA finds in the Clean Air Act – cannot be regarded as durable, however intelligible it may be.[5] Such language must be construed narrowly to apply only to the particular factual context of the original legislation, because

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[4] Lutter and DeMuth, supra n.3, at 2."Setting a standard based on two factors – one increasing and the other decreasing as the standard changes – produces, in principle, a determinate result."

[5] Various commenters have argued that the consideration of costs in setting NAAQS is forbidden (Petitioner EPA), permitted (Cross-petitioners), or required (Lutter & DeMuth). Without trying to resolve the dispute here, MAPI submits that if such consideration is forbidden, the EPA's authority must be narrowly construed. MAPI agrees with cross-petitioners that the Court should review the holding below that *Lead Industries* precludes EPA's consideration of costs.

to do otherwise would impermissibly sever the legislative act from its adverse consequences. If new science becomes available it cannot be presumed that Congress would arrive at the same conclusions that it did at the time of enactment, because (a) it could not consider adverse consequences of which it was not then aware AND (b) it made no provision for the agency to take account of them in an intelligible way.[6] When the Congress puts blinders on an agency, it also applies handcuffs, for an agency cannot be empowered to reach farther than it can see.

Nothing in the Constitution requires that the Congress use a substantive benefit-cost balancing standard when writing laws; nor does it require that the Congress impose such a standard on decisions it delegates to administrative agencies. If it wishes to enact a delegation of authority that is broad and durable, however, the Congress should choose some form of versatile standard that instructs the agency to balance the anticipated desirable and undesirable consequences of proposed administrative actions. Courts should give this form of delegation wide latitude, while at the same time reading narrowly other forms of delegation that are too rigid to allow for administrative adaptation to new facts. That is, the very versatility of the relevant "intelligible principle" can and should play a role in determining how far a particular congressional enactment is intended to reach.

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[6] The majority opinion in *Brown & Williamson* correctly inferred that the rigidity of the statute – unsafe devices must be banned – argued for a narrow construction that did not treat cigarettes as a device. Slip op. at 19. The dissent argued that one could just as easily conclude that such a ban was required (Breyer, J., dissenting), sip op. at 14. Yet the rigidity of the statutory language compels the Court to apply it narrowly; a more flexible "balancing" principle might have been read more broadly.

C. When An Administrative Agency Feels Compelled To Act, But Finds That Changes In Science Have Rendered An Intelligible Principle Unworkable, The Agency Should Seek A Legislative Extension Of Its Authority.

The Court of Appeals in this case correctly recognized the difficulties inherent in a statute that ostensibly takes no account of costs and is applied to a pollutant whose harm displays no discernible threshold. Lacking a clear decision point, and lacking any overt balancing process, the reviewing court was left contemplating the black box of the unconstrained "judgment of the Administrator." The Circuit Court correctly concluded that the EPA's interpretation of Section 109 did not meet the established "intelligible principle" standard. Without a stated statutory limit on the EPA's discretion, the delegation appears "unconfined and vagrant." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring).

Following *Chevron,* the Court of Appeals in this case found that it is up to the agency – not the reviewing court – to rescue the constitutionality of the delegation by discerning the requisite intelligible principle. Of course, the agency, just like the reviewing court, must look to the text, context, and history of the congressional delegation to find such a principle, because Congress is the institution constitutionally accountable for the consequences of any expansion of the "standards of legal obligation." *Schechter Poultry,* 295 U.S. at 530.

Often, however, even where Congress has enacted an intelligible principle into law, some unanticipated change in science or technology may cause that principle to become obsolete, or fail to provide intelligible parameters in certain factual settings.

Under these circumstances, if the agency proposes to promulgate regulations that respond to a changed factual landscape, but cannot find an intelligible principle that

applies to the circumstances at hand, it should request from Congress an expansion of its authority. No administrative agency may lawfully address a given factual situation if its authorizing statute lacks an intelligible principle that can accommodate that situation. Nor can the agency solve the problem merely by consulting with scientists. Science dwells in the realm of fact, and fact by itself cannot make law.

Modern statutes, such as the Clean Air Act, frequently delegate authority to the Executive to decide what is "safe" or "adequate" or "requisite" to protect "the public health." One consequence is that agency rules are often based on scientific findings that are difficult for the courts to review. The degree to which a court should scrutinize an agency's scientific findings, and the degree to which this agency's science could withstand such scrutiny, are both interesting questions. But the more fundamental question is whether science is capable of resolving disputes that have deep economic and political dimensions.

In the present case, the EPA proposes a regulatory regime that imposes far greater costs than benefits – costs that the agency itself refuses to consider. A decision of this gravity must at some point acquire political legitimacy, and the agency must look to Congress to provide it. This political legitimacy can take the form either of an intelligible principle discerned from an existing statute (one adequate to the factual situation), or of an enactment expanding the agency's authority. But neither the judgment of an Administrator nor the conclusions of science can substitute for legislative deliberation.

The agency, whose action precipitated the controversy before the court, is in the best position to decide which of three courses to take: (1) Develop a new interpretation of its statutory authority that dispels any concern about unaccountable delegation; (2) Scale back its own regulation to comply with a narrower interpretation of its statutory authority; or (3) Propose to the Congress a statutory

amendment that would grant the agency the authority it believes it needs.

Petitioner EPA in this case would spurn all three avenues and now asks the Court, in effect, to remove the constitutional impediments to its free exercise of self-ascribed authority. MAPI respectfully urges the Court to grant *certiorari* in order to dispel any notion that such carte blanche authority can be countenanced within the constitutional separation of powers.

CONCLUSION

As this case provides an opportunity for the Court to enunciate the relevance of the nondelegation doctrine in reviewing agency interpretations of broad grants of authority in spheres of rapidly changing science, *amicus curiae* MAPI supports granting a writ of *certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

(*Case captions continued on inside cover*)

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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2 pp

MASSACHUSETTS AND NEW JERSEY,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

AMERICAN LUNG ASSOCIATION,

Petitioner,

—v.—

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BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

The northeastern States of New York, Connecticut, Maryland, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont respectfully submit this brief as *amici curiae* in support of the Petitions for a Writ of Certiorari filed in this matter by the U.S. Environmental Protection Agency (EPA) and Carol Browner, Administrator of EPA; by the States of Massachusetts and New Jersey; and by the American Lung Association (collectively, the "petitions"). The petitions seek review of the D.C. Circuit's decision in *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), to remand EPA's revised eight-hour ozone National Ambient Air Quality Standards for ozone and fine particulate matter ($PM_{2.5}$).

INTEREST OF THE AMICI CURIAE

The northeastern amici States share an interest in obtaining review of the decision below in order to ensure the adequate protection of their residents' health and their environment. Residents of these States suffer from asthma and other respiratory illnesses aggravated by high levels of ozone and $PM_{2.5}$ in the ambient air. Recent studies document an alarming increase in the asthma hospitalization rate in the northeastern United States including, in particular, the lower income neighborhoods of color in the Bronx and Upper

Manhattan, inhabitants of which suffer from rates of asthma that are at least double the national average.[1] As *parens patriae*, New York and the other amici States have a paramount interest in protecting their residents from the debilitating and potentially life threatening effects of asthma and other respiratory illnesses.

The record of the rulemakings at issue in this matter establishes that the revised standards will have a profound impact on public health, eliminating thousands of premature deaths attributable to air pollution each year and preventing tens of thousands of respiratory illnesses attributable to exposure to ozone and fine particulate matter.[2] Specifically, implementation of the revised standards will greatly improve the quality of life of the children and other persons who suffer from asthma, a disease aggravated by exposure to ozone and $PM_{2.5}$. The court below did not question the scientific basis for EPA's determination that the revised standards are needed to protect public health.

The Clean Air Act (the "Act") places primary responsibility for achieving clean air upon the states. To date, the efforts of many eastern states to obtain clean air that meets the old ozone standard have been hampered by the large amounts of ozone and its precursor, nitrogen oxides, that blow into the region from relatively uncontrolled power plants and

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[1] *See* L. Claudia, *et al.*, *Socioeconomic Factors and Asthma Hospitalization Rates in New York City*, 36(4) Journal of Asthma at 344 (1999).

[2] The health benefits of the required standards are described in more detail in the American Lung Association's petition for certiorari.

other large industrial sources, many of which are located in areas classified as attainment with the old standard. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998). Some states, like New York and Connecticut, are endeavoring to meet their obligation to comply with the old one-hour EPA standard for ozone by the 2007 attainment date, while others, like Vermont and New Hampshire, find that transported pollution complicates their efforts to remain in compliance with the old standard. Implementation of the EPA's revised eight-hour ozone standards nationwide will greatly facilitate the northeastern states' ability to clean their own air because of the emission reductions that will be required throughout much of the eastern portion of the country, including states to the south and west of the amici States.

The interest of the amici States in obtaining review of the D.C. Circuit's decision extends beyond the implementation of the specific standards at issue. As recognized by Judge Tatel's dissent to the denial of the rehearing petition, joined by Chief Judge Edwards and Judge Garland, the D.C. Circuit's holding threatens to paralyze further EPA efforts to improve air quality, at the expense of the health of residents of the amici States and other states:

> Not only did the panel depart from a half century of Supreme Court separation of powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of

> its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by millions of people. App. 91.[3]

Residents of the amici States benefit from a number of EPA programs directed at improving air quality, including EPA's efforts to control interstate transport of ozone and its precursors, and its imposition of more stringent emission control requirements for motor vehicles. Because the poor air quality in the Northeast is attributable in large part to air pollution transported from other states or to motor vehicle emissions that states are barred from regulating, pursuant to section 209(a) of the Act, 42 U.S.C. § 7543(a), the amici States find it extremely difficult to achieve any significant improvement in the quality of their air without EPA's exercise of its authority in other areas to reduce motor vehicle emissions and interstate pollution.

Finally, the ramifications of the nondelegation holding transcend EPA's efforts to obtain clean air for all Americans. The court's nondelegation holding threatens federal efforts to protect the health and safety of Americans under many diverse federal programs. Although the full ramifications of the decision are yet to be determined, it throws into question federal efforts to protect public health and safety in many areas such as automobile safety and airline safety, in addition to

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[3] Citations are to the Appendix filed in support of the Massachusetts and New Jersey petition.

environmental protection. The amici States have a fundamental interest in seeing that the health and safety of their residents do not suffer as a consequence of the D.C. Circuit's decision.[4]

SUMMARY OF ARGUMENT

The D.C. Circuit's decision will prevent or, at a minimum, postpone access to cleaner air for all Americans. The D.C. Circuit recognized the overwhelming body of scientific evidence that supported EPA's determination that the current .120 ppm one-hour ozone standard is inadequately protective of public health. Nevertheless, as a result of the D.C. Circuit's holding, the inadequate one-hour standard will be the only protection Americans will have against the health dangers of ozone pollution for many years to come. Even if EPA is able to formulate an "intelligible principle" to govern its setting of revised standards, the Court's holding that new ozone revised standards may only be implemented in accordance with the facially inapplicable subpart 2 classifications and compliance deadlines means that any protection Americans can expect from revised ozone standards will not be realized or, at best, will be postponed even further.

More generally, the D.C. Circuit's decision effectuates a fundamental alteration of the balance of power among the three branches of government in the area of environmental regulation. In the name of adherence to the principle that the democratically-elected Congress should make the fundamental

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[4] Connecticut, New Hampshire, New York and Vermont participated in the D.C. Circuit proceedings as amici, submitting joint briefs with Massachusetts and New Jersey, which intervened in the cases.

policy determinations, the D.C. Circuit found inadequate the delimiting principles promulgated by Congress in section 109 of the Act, 42 U.S.C. § 7409, and remanded to EPA to come up with its own "intelligible principle" to govern its decisionmaking processes, which will then be reviewed by the D.C. Circuit. In the second portion of its holding, the D.C. Circuit rejected the agency's practical interpretation of the Act, in favor of the court's own technically intricate, but ultimately unsound reading of the relevant provisions. Both aspects of the D.C. Circuit's opinion have the effect of placing policymaking authority in the hands of the judicial branch, rather than the legislative and executive branches of government that are elected by the populace, and throw into doubt other federal efforts to protect the health and safety of Americans.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION ON IMPLEMENTATION OF THE NEW EIGHT-HOUR OZONE STANDARDS WILL POSTPONE THE BENEFITS OF CLEANER AIR FOR MUCH OF THE NATION

The D.C. Circuit's holding that any revised eight-hour ozone National Ambient Air Quality Standard ("NAAQS") may only be implemented in accordance with a statutory schedule and classification scheme intended to address the old ozone NAAQS will have significant ramifications for the amici States' efforts to obtain cleaner air. Regardless of whether EPA, on remand, is able to repromulgate the ozone NAAQS in

accordance with the Court's nondelegation holding, the obstacles erected by the court to implementation of the revised standards may prevent the States from implementing those standards.

The D.C. Circuit's determination that EPA must enforce the revised eight-hour NAAQS in accordance with the classifications and attainment dates adopted by Congress in 1990 is premised on a faulty interpretation of the Act's provisions governing implementation of the ozone NAAQS. At the core of the D.C. Circuit's holding is section 181(a)(1) of the Act, 42 U.S.C. § 7511(a)(1), entitled "Classification and attainment dates for 1989 nonattainment areas," which contains as its centerpiece a table that lists classifications and attainment deadlines for meeting the one-hour .120 ppm standard existing at the time of the 1990 amendments.[5] In reaching its holding that this table governs the classifications and attainment dates for areas found to be in noncompliance with the new eight-hour .080 ppm standards promulgated in 1997 (App. 75), the D.C. Circuit paid no heed to the fact that the classification scheme is

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[5] Table 1 of the statutory provision reads as follows:

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

nonsensical when applied to a .080 ppm standard, rather than a .120 ppm standard, and it failed to explain how a statutory provision with attainment deadlines in the 1990s could possibly govern a revised standard that would not be implemented until after 2000.[6] In the name of allegiance to the statutory text, the D.C. Circuit also disregarded the clear statement in the title of section 181(a)(1) that it only governs "classification and attainment dates for 1989 attainment areas" on the grounds that "a title cannot be allowed to create an ambiguity in the first place." App. 39.

In opposing the granting of certiorari on this issue, industry respondents contend that it is the type of routine statutory interpretation question that is normally not reviewed by the Court. However, the D.C. Circuit's holding, if allowed to stand, throws into doubt the D.C. Circuit's continued adherence to *Chevron* deference. *Chevron U.S.A. Inc. v.*

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[6] Other references in section 181(a) provide further evidence that its provisions are intended to apply only to areas designated as nonattainment with the standard existing at the time of the 1990 amendments. For example, section 181(a)(1) provides that the design value that forms the basis for the classifications should be calculated in accordance with the "interpretation methodology issued by the Administrator most recently before November 15, 1990." Furthermore, section 181(a)(3) provides that the classifications should be made at the time of the designation of an area as nonattainment with the 1990 ozone standard under section 107(d)(4), 42 U.S.C. § 7407(d)(4); there is no procedure for classification under a new or revised standard. Finally, reclassification to nonattainment with the old one-hour .120 standard of areas initially designated as attainment in 1990 is governed by section 181(b)(1), which applies only to areas redesignated as nonattainment with the old one-hour standard under section 107(d)(3), not to areas redesignated as nonattainment with a new or revised ozone standard under section 107(d)(1).

NRDC, 467 U.S. 837 (1984). Instead of deferring to an agency interpretation of section 181(a) of the Act that is consistent with the substance and title of the provision,[7] the D.C. Circuit substituted its own reading of the statute for the reading adopted by EPA. At best, the cross-reference in section 181(a)(1) to section 107(d) rather than just 107(d)(4), which provides the entire shaky foundation for the D.C. Circuit's interpretation, creates an ambiguity in the statute, requiring that deference be given to EPA's reasonable interpretation.[8] The ambiguity of the Act's provisions regarding implementation of revised standards is also reflected by the inability of the panel

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[7] Under similar circumstances, this Court has found that the title of a statute provides valuable evidence of Congressional intent in enacting a statute. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

[8] In his opinion concurring in part and dissenting in part, Judge Tatel recognized that it is not the title of section 181(a)(1) that creates the ambiguity but that "the ambiguity in this statute . . . appears in the text of Subpart 2 itself." App. at 77. He explained:

> "As the agency argues, it is thus difficult to see how Subpart 2 can 'specifically provide[]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by table 1. . . . This gap in Table 1 makes it at least ambiguous whether Subpart 2 '*specifically* provide[s]' classifications and attainment dates for *all* areas exceeding the revised 0.08 ppm ozone NAAQS." *Id.*

As explained by Judge Tatel, it is for EPA, not the D.C. Circuit, to interpret an ambiguous statute, an interpretation that the D.C. Circuit is bound by *Chevron* to follow if reasonable. App. at 81.

and Judge Tatel to agree on a way to conform the provisions of subpart 1 and subpart 2.[9] However, rather than ensuring that the policy decisions are made by Congress and implemented by executive agencies, the D.C. Circuit's refusal to accord deference to EPA's reading of the statute effectuates a judicial usurpation of policymaking authority. To the extent that the D.C. Circuit's approach in this case signals a weakening of the principle of *Chevron* deference, federal agencies will find it increasingly difficult to fulfill their obligation to serve the public.

Furthermore, implementation of the revised standards will be hindered by the many uncertainties inherent in the court's treatment of the implementation issues. For example, does the panel's opinion allow the implementation of the revised ozone standards under subpart 1 in the large portions of the nation that do not fall into one of the subpart 2 classifications (i.e. areas that do not meet the revised eight-hour standard of .080 but do meet the old one-hour standard of .120)? If Judge Tatel is correct that subpart 1 provides the deadlines for areas that meet the old standard, does that mean

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[9] On rehearing, Judge Tatel concurred in the panel's decision, as modified, because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." (App. 76). Judge Tatel stated that, in his view, "[s]ubpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under subpart 1." (App. 81). However, Judge Tatel's belief that "nothing precludes the enforcement of the new standard under subpart 1" (App. 81) appears to conflict directly with the panel's holding that "[s]ubpart 2, not subpart 1, provides the classifications and attainment dates for *any* areas designated nonattainment under a revised ozone NAAQS." (App. at 39-40) (emphasis supplied).

that EPA must provide those areas with at least five years after they meet the old standard for compliance with the new standard? The apparent disagreement between Judge Tatel and Judges Ginsburg and Williams regarding the meaning of the D.C. Circuit's decision highlights the difficult task facing EPA and the states in conforming their conduct to the decision, making it likely that their attempts to implement the revised primary ozone NAAQS will be tied up in litigation regarding the meaning of the D.C. Circuit's decision for years to come.[10]

II. THE D.C. CIRCUIT'S NONDELEGATION HOLDING IS CONTRARY TO THIS COURT'S ESTABLISHED PRECEDENT AND THROWS INTO DOUBT FEDERAL EFFORTS TO PROTECT THE HEALTH AND SAFETY OF ALL AMERICANS

In its initial opinion, and in the opinion denying rehearing, the D.C. Circuit resuscitated the nondelegation doctrine, holding that, in the absence of a narrowing agency interpretation, section 109 of the Act effectuates an

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[10] In its petition, EPA argues persuasively that the D.C. Circuit erred by reaching out to address the propriety of EPA's plan for implementation of the revised ozone NAAQS, an issue that was not ripe for consideration and not squarely before the court. The apparent failure of Judge Tatel and the panel to agree on the meaning of the D.C. Circuit's holding is directly attributable to the court's error in reviewing non-final agency action, rather than waiting for the agency to take concrete steps to implement the revised NAAQS. In the absence of review by this Court, public health and the environment will be threatened by the delays in implementation of the revised standard that will result from the inevitable litigation over the meaning of the D.C. Circuit's decision.

unconstitutionally broad delegation to EPA. Despite the efforts of industry respondents to recast the decision as a rather mundane and uncontroversial question of administrative law,[11] the court's holding clearly and necessarily includes a determination that the text of section 109 does not contain the "intelligible principle" found by the court to be required by the Constitution to confine administrative decisionmaking. Thus, the D.C. Circuit remanded the case to EPA to articulate another intelligible principle -- other than the principle actually found in the statute -- to govern its decisionmaking.

The doctrinal foundations of this determination are puzzling: having found the criteria articulated by Congress to be constitutionally inadequate, the D.C. Circuit is now inviting EPA to conjure up alternative principles to guide its own exercise of discretion. As explained by Judge Silberman's dissent from the denial of rehearing, this determination turns the nondelegation doctrine on its head, divorcing it from the underlying principle that it is the democratically-elected Congress, rather than appointed administrative agency officials, that should make the fundamental policy determinations. *See* App. 86-88.

The D.C. Circuit's holding threatens to alter profoundly the nation's health and regulatory framework. In finding that section 109 does not contain the required "intelligible principle," the court departed from decades of precedent

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[11] *See, e.g.*, Brief in Response for the Respondents Appalachian Power Co., et al., at 13; Brief in Response for Respondents American Trucking Associations, Inc., et al., at 11-14.

upholding even broader delegations.[12] As explained by Judge Tatel in dissent, joined by Chief Judge Edwards and Judge Garland, "the Clean Air Act's requirement that EPA set air quality standards 'requisite to protect public health' with 'an adequate margin of safety' based on criteria that 'accurately reflect the latest scientific knowledge' is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." App. 90. *See also* EPA Pet. at 11-19.

The delegation at issue is also narrower than many delegations of regulatory authority found in other statutes intended to protect public health and safety. For example, the federal statutes governing pesticide residues in foods and hazardous waste transportation contain delegations for adoption of regulatory standards that are more open-ended than EPA's authority to promulgate NAAQS. *See* 21 U.S.C. § 346a (pesticide residues in food);[13] 42 U.S.C. § 6923(a) (hazardous waste transportation).[14] EPA's discretion in adopting new or

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[12] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373 (1989); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Touby v. United States*, 500 U.S. 160 (1991).

[13] Under section 408(b) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(b), EPA may establish a tolerance for levels of particular pesticides on food if EPA determines "that there is a reasonable certainty" that no harm will result from exposure.

[14] Section 3003 of the Solid Waste Disposal Act, 42 U.S.C. § 6923(a), requires EPA to promulgate standards for the transportation of hazardous waste "as may be necessary to protect human health and the

(continued...)

revised NAAQS is also more circumscribed than the authority of the National Highway Traffic Safety Administration (NHTSA) to promulgate motor vehicle safety standards, which is limited only by the requirement that the standards be "practicable, meet the need for vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). NHTSA's obligation to "consider relevant available motor vehicle safety information" (*id.* at § 30111(b)(1)) is less restrictive than the requirement that the NAAQS be "based on" on air quality criteria (42 U.S.C. § 7409(b)(11); and its duty to "consult" with other agencies (*id.* at § 30111(b)(1)) is more open-ended than EPA's obligation to consider, and explain any departure from, the CASAC recommendations. 42 U.S.C. § 7607(d)(3). Rules relating to airline safety are also promulgated under an equally broad delegation.[15]

Thus, unless the D.C. Circuit's ruling is reversed by this Court, it may lead to the undoing of federal regulations regarding such important matters as airline safety and automobile safety, in addition to environmental protection. A

(...continued)
environment."

[15] The Federal Aviation Administration (FAA) promulgates standards governing airline safety under 49 U.S.C. § 44701. Pursuant to section 44701(c), FAA is required to carry out this responsibility "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." In doing so, the FAA is required to "consider . . . the duty of an air carrier to provide the highest possible degree of safety in the public interest; and . . . differences between air transportation and other air commerce." This standard is similar to EPA's obligation to enact standards "requisite to protect public health" with an "adequate margin of safety."

decision joined by only four of the eleven members of the D.C. Circuit should not be allowed to effect such a profound alteration of this nation's health and safety regulatory framework without review by this Court.[16]

CONCLUSION

For the reasons set forth above and in the petitions, the Court should grant certiorari in these cases.

Dated: March 28, 2000

Respectfully submitted,

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[16] Two of the eleven members of the court did not participate.

Supreme Court, U.S.
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Nos. 99-1263 and 99-1265

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS AND STATE OF NEW JERSEY, PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

AMERICAN LUNG ASSOCIATION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

No. 99-1263

COMMONWEALTH OF MASSACHUSETTS AND STATE OF NEW JERSEY, PETITIONERS

v.

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AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

The Solicitor General, on behalf of the federal respondents, supports the petition for a writ of certiorari filed by the Commonwealth of Massachusetts and the State of New Jersey and the petition for a writ of certiorari filed by the American Lung Association. Those petitions, like the federal government's petition in *Browner* v. *American Trucking Ass'ns*, No. 99-1257, seek review

of a judgment of the United States Court of Appeals for the District of Columbia Circuit that remands the Environmental Protection Agency's (EPA's) final rules revising the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. See Clean Air Act § 109, 42 U.S.C. 7409.

As the federal government explained in its petition, the court of appeals' rulings on the nondelegation doctrine and the scope of EPA's authority to implement a revised ozone NAAQS present issues of immense practical and legal importance that have a direct impact on the health of the American public. The petition of the States and the petition of a major public health organization underscore those points and provide additional information, perspective, and context for the legal issues framed in the federal government's petition. Those petitions should therefore be granted and consolidated for briefing and argument with the federal government's petition in No. 99-1257.

Respectfully submitted.

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MARCH 2000

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Nos. 99-1257, 99-1263, 99-1265,
99-1426, 99-1431, 99-1442
(5) (5) (5)

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

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CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord*, Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

---

[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Nondelegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts," id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) ("*Vinyl Chloride*"); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health*." (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air*, in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

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[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

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[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

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[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

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[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors,* an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

Respectfully submitted,

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[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.

(15) (13) (13)

Nos. 99-1257, 99-1263, 99-1265

Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS AND THE STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF STATE PETITIONERS

This case concerns two separate rules issued by EPA with respect to two different pollutants: particulate matter and ozone. The court below invalidated both rules on the basis of the "nondelegation" doctrine. A large number of respondents concede that this deviant but important constitutional ruling warrants this Court's review. (Brief in Response for Respondents American Trucking Associations, *et al.*, 10 ("ATA Resp."); Brief in Response for States of Ohio, Michigan and West Virginia 3 ("Ohio Resp.").) However, one group of respondents avers that the lower court's invalidation of EPA's rules on the basis of a constitutional doctrine not used by this Court to overturn a statute in more than six decades is so "pedestrian" that it requires "no comment, let alone Supreme Court review." (Brief in Response for Appalachian Power Co., *et al.*, 24 ("App. Pwr. Resp.").) As set forth below, however, respondents premise this audacious claim on a mistaken reading of the opinion below, and on the implicit constitutionalization of basic principles of administrative law.

The court also held that the ozone standard could not be enforced. As to the question whether this ruling comports with the Clean Air Act, all respondents urge this Court to leave matters where they stand. But the two questions that petitioners have brought before this Court concerning the ozone standard – constitutional and statutory – should be heard together. Unless this Court grants review of the statutory question whether EPA may enforce the revised ozone standard, review of the constitutional question *as it applies to the ozone rule* may amount to a pointless exercise in abstraction. To avoid this eventuality, the Court should grant review of both questions, constitutional and statutory, presented by petitioners.

1. *The constitutionality of the Clean Air Act as applied to EPA's revised rules.*

The court below held that the "statutory language" of the Clean Air Act and the "existing agency interpretation" of that language "involve an unconstitutional delegation of power." (Appendix to State Petitioners' Petition for Certiorari 12 ("App.").) Many respondents, including the State of Ohio, concede that this remarkable constitutional ruling warrants this Court's review. (ATA Resp. 10; Ohio Resp. 3.) When the United States Government and States that are parties to a case collectively request this Court's review and when, moreover, a large contingent of industry parties acquiesces in that request, such a case comes to this Court with a heavy presumption that review is warranted.

Despite their sensible concession about the importance of this case, however, Respondents ATA, *et al.*, attempt to recast the decision below as a "work-a-day" remand under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (ATA Resp. 14.) Similarly, Respondents Appalachian Power, *et al.*, strain to fit the court's problematic constitutional decision into the familiar framework of "arbitrary and capricious" review under the Administrative Procedure Act and statutory interpretation under *Chevron* (App. Pwr. Resp. 12-13, 15.) Respondents National Stone Association, *et al.*, make a similar attempt. (Brief in Response for Respondents National Stone Association and Kennecott Holdings Corporation, *et al.*, 7-8 ("Nat'l Stone Resp.").) These efforts to domesticate the D.C. Circuit's bold ruling do not succeed.

Tellingly, none of the respondents defends the lower court's ruling that the "statutory language" of the Clean Air Act violates the nondelegation doctrine. (App. 12.) Instead, respondents seek to reassure this Court that the constitutional status of the Clean Air Act itself – which has been on the statute

books for three decades and has been the subject of numerous judicial challenges, including several in this Court – is secure. (App. Pwr. Resp. 8 ("The court did *not* hold the statute itself unconstitutional"); ATA Resp. 15 (statute "undisputedly is not" unconstitutional)). Presumably, respondents recognize that a failure to concede the constitutionality of the Clean Air Act would place their views at obvious odds with this Court's numerous precedents upholding far broader delegations against constitutional attack (discussed in our petition at 18-21). Thus, rather than acknowledging that the court below found that the "statutory language" of the Clean Air Act violated the nondelegation doctrine (App. 12), respondents repeatedly claim that the court found only that EPA's *interpretation* of the Act was unconstitutional.

But how does a statute that is "undisputedly" constitutional somehow *become* unconstitutional when interpreted by an administrative agency?

Respondents Appalachian Power, *et al.*, offer the most adventuresome answer to this question. Distancing themselves from the dubious constitutional grounding of the D.C. Circuit's opinion, these respondents implicitly equate the arbitrary and capricious standard of review with the constitutional doctrine of delegation. For example, respondents cite decisions based on the arbitrary and capricious standard as if those decisions support the D.C. Circuit's constitutional ruling. (See, e.g., App. Pwr. Resp. 17 (citing *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).) Even more bewilderingly, respondents also suggest that the D.C. Circuit's rationale for remanding EPA's rules

> might as well have been articulated as "arbitrary and capricious" agency action – that EPA failed to state a rational basis for its decision. *Whatever the rationale*, the

> proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review. (App. Pwr. Resp. 12-13 (footnotes omitted, emphasis added).)

See also Nat'l Stone Resp. at 7-8. Respondents' casual equation of the nondelegation doctrine with the arbitrary and capricious standard should not be countenanced.[1] Respondents'

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[1]It is possible that the respondents, in the passage cited in text, are inartfully attempting to defend the court's judgment on the basis of an argument not reached by the court below. This Court should not decide the question whether EPA's rules are arbitrary and capricious. Addressing this question would require systematic, in-depth scrutiny of the voluminous record in this case. This complex and fact-bound issue should be considered in the first instance by the appeals court. Moreover, respondents did not present this argument in this same form below, and therefore the question whether EPA's rules are arbitrary and capricious in the way respondents now allege is not properly before this Court. With respect to particulate matter, for example, respondents did not argue to the lower court that EPA's revised particulate matter rule was arbitrary and capricious due to the agency's failure to explain why it targeted one pollutant level rather than another. Rather, respondents took issue with the scientific evidence underlying the revised standard, see Brief of Non-State Petitioners on Fine Particulate Matter NAAQS, and with EPA's failure to consider the effects of the rules on small businesses, see Brief of Small Business Petitioners and Intervenor (PM Rule). Likewise, with respect to the ozone standard, respondents challenged the scientific evidence underlying EPA's finding of an unacceptable risk to human health, but did not ask the court to require EPA, in the name of arbitrary and capricious review, to set "determinate, binding standards" such as those ultimately

theory would threaten to turn every departure from the principles articulated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), into a constitutional case. Needless to say, such a result would vastly and inappropriately enlarge courts' authority to invalidate agency action on constitutional grounds.

Respondents Appalachian Power, *et al.*, also offer a second theory as to how an "undisputedly" constitutional statute may be transmuted into an unconstitutional one in an agency's hands, and in this instance they are joined in their argument by respondents ATA, *et al.* Respondents contend that the court's ruling invalidating EPA's rules under the Clean Air Act on constitutional grounds is "functionally indistinguishable" from a "work-a-day" ruling that, according to the principles of *Chevron*, the agency simply misinterpreted the Clean Air Act. (ATA Resp. 14; *see also* App. Pwr. Resp. 13 & n. 27, 15; *cf.* Nat'l Stone Resp. 9).[2]

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required by the court (App. 12). See Brief of Non-State Clean Air Act Petitioners and Intervenors 48-53 (Ozone Rule).

[2]Although all of the respondents appear to agree that EPA misinterpreted the Clean Air Act, they do not agree as to how the agency *should* have interpreted the Act. For example, compare Nat'l Stone Resp. 9 (arguing that EPA misinterpreted Act in not quantifying risk before regulating) with App. Pwr. Cross-Pet. (arguing that EPA misinterpreted Act to preclude consideration of factors unrelated to public health effects resulting from pollution's presence in ambient air). As we discuss in our opposition to respondents' cross-petitions, respondents offer quite a varied array of different possible interpretations of the Clean Air Act in the course of arguing that the meaning of the statute is clear. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

Nowhere did the court below suggest, however, that EPA had *misinterpreted* the Clean Air Act. Indeed, the court *upheld* EPA's longstanding interpretation of the statute to forbid the consideration of costs and feasibility in setting the NAAQS. (App. 17-20.)[3] Rather than finding that EPA's position was a misinterpretation of the Clean Air Act, the court found that the agency's interpretation, though permissible under the statute, was unconstitutional. This ruling is a world away from a ruling that EPA merely misinterpreted the statute. Here, too, therefore, respondents work hard to dismiss the constitutional significance of the court's ruling, and in doing so both misread the court's opinion and intimate that agencies that violate *Chevron*, violate the Constitution. (App. Pwr. Resp. 16 & n. 35 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), a garden-variety statutory interpretation case, as a "'nondelegation'" case).)

Respondents' understandable desire to distance themselves from the dubious constitutional foundations of the lower court's decision cannot be squared with their argument that the constitutional status of the Act as interpreted for thirty years is so seriously in doubt that this Court should rewrite the Act in order to avoid deciding a constitutional question. (ATA Cross-Pet. I.) Respondents cannot have it both ways. An "undisputedly" constitutional statute does not require or permit invocation of the canon counseling avoidance of constitutional decisions: "The canon about avoiding constitutional decisions . . . must be used with care, for it is a closer cousin to invalidation than to interpretation. . . . Constitutional decisions breed penumbras, which multiply questions. Treating each as

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[3]In our Brief in Opposition, we explain why the Conditional Cross-Petitions on this statutory question should be denied. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

justification to construe laws out of existence too greatly enlarges the judicial power." *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook, J.).

2. *The enforceability of the revised ozone standard.* Respondents do not seek review of the D.C. Circuit's ruling that the Clean Air Act authorized EPA to revise the air quality standard for ozone. (App. 31-33.) Nor do they challenge the court's holding that EPA must designate areas as attainment, nonattainment, or unclassifiable under the revised standard. (App. 33-34.) Nevertheless, they argue that the court's ruling that section 181(a)(1) precludes EPA from *enforcing* the revised ozone standard is unworthy of this Court's review because the court's decision is correct and because the ruling is in an interlocutory posture. Neither of these assertions has merit.

In arguing that the language of section 181(a)(1) supports the lower court's ruling, respondents ignore most of the language of this provision. As we set forth in detail in our Petition, the language of sections 181 and 182 overwhelmingly points to the conclusion that these provisions are exclusively concerned with implementation of the former, one-hour ozone standard – the standard that existed when these sections were enacted. (Pet. 21-25.)

Respondents also never confront the absurd implications of the lower court's interpretation of section 181(a)(1). The court held that EPA may revise the ozone standard and, if it does so, it *must* designate areas according to their attainment status *under the revised standard.* (App. 33-34.) However, if section 181(a)(1) is interpreted as the court below interpreted it, then the agency must *disregard its designations under the revised standard* and *classify* areas according to the previous, one-hour ozone standard. (Pet. 23-24.) This conclusion follows from the plain language of section 181(a)(1): areas

designated nonattainment under this provision must be classified "according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. 7511(a)(1). The interpretation methodology in effect at that time was based on the previous, one-hour ozone standard. (Pet. 23 & n. 9). Thus, if EPA must, as the court below held and as respondents claim, classify areas under the revised standard under section 181(a)(1) of the Act, and not under Subpart 1, then EPA will be forced to classify areas according to the ozone standard that it has abandoned. There is no warrant in the language, structure, or purpose of the Clean Air Act for sanctioning such an odd result.[4]

Nor does the legislative history support respondents' awkward reading of section 181(a)(1). Respondents ATA, *et al.*, claim that "Congress *specifically considered* and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims that *enacted* statute does." (ATA Resp. 23 (emphasis added and in original).) While it is true that the version of Subpart 2 contained in the original House and Senate bills referred specifically to the bills' equivalent of section 107(d)(4) rather than to 107(d) as a whole, there is nothing in

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[4]Subsequent legislation confirms our reading of the statute. In the Transportation Equity Act for the 21st Century, Congress reaffirmed the States' and EPA's obligations to designate areas under the revised ozone standard. Congress extended the States' statutory deadline for submitting designations, and shortened EPA's deadline for promulgating them. Pub. L. No. 105-178, § 6103, 112 Stat. 465 (1998). Under respondents' interpretation of the Clean Air Act, Congress, in taking this action in 1998, simply – pointlessly – reaffirmed the States' and EPA's obligations to promulgate designations that would then be completely ignored.

the legislative history to suggest that this change was meant to transform a revised ozone standard from an enforceable standard into an unenforceable one. Indeed, the failure to include the single number "(4)" in the final law – which, on respondents' reading, dramatically reworked the regulatory scheme – went unremarked in the legislative history.[5]

Respondents also argue that the question whether the revised ozone standard may be enforced is in an "interlocutory posture" because EPA must now, in light of a part of the D.C. Circuit's decision not challenged here, consider and evaluate the claim that smog is good for people. (*E.g.*, App. Pwr. Resp. 29-30.) Respondents claim that EPA must now redo the entire process of setting air quality standards, including issuing a new Criteria Document – a process that Respondents ATA, *et al.*, assert will take from "three to five years." (ATA Resp. 17.)

Even assuming that respondents are correct in claiming that EPA must now entirely redo its work on the ozone standard, and even assuming they are correct that this process will take from three to five years, this gives this Court all the more reason to grant review of the question whether the ozone standard may be enforced. For if respondents are correct, EPA must now engage in a lengthy and complex process, likely involving scores of agency personnel, in order to revise a standard that the court below has ruled cannot be enforced. This would be a colossal waste of precious resources.[6]

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[5]*See* H.R. Rep. No. 101-490, Pt. 1, at 229-232, *reprinted in* 2 1990 Legis. Hist. 3253-3256.

[6]Respondents also oppose review on the Subpart 2 issue on the ground that the lower court has "left open the door" to further proceedings with respect to Subpart 2. (ATA Resp. 20, citing the United States' appendix to its petition, at 81a.) The

Many of the parties in this case agree that the question whether EPA's revised ozone standard violates the nondelegation doctrine is worthy of this Court's review. Yet unless this Court also agrees to review the question whether this standard may be enforced, review of the constitutional question pertaining to the ozone standard may turn out to be a pointless exercise, as it may succeed only in either ratifying or undoing an agency standard that in any event may not be enforced. In this way, the constitutional and statutory questions petitioners have raised are closely connected, and this Court should review them together.

CONCLUSION

The petitions for a writ of certiorari should be granted.

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only proceedings for which the court left open the door, however, are proceedings to reconsider the court's decision *not to vacate* the ozone standard. (U.S. App. 81a.)

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No. 99-1265 (14)

In The

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION,

Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY OF AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE

American Lung Association (ALA) adopts the Rule 29.6 disclosure set forth in ALA's petition for certiorari at ii.

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REPLY OF AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

None of the responses to American Lung Association's (ALA's) petition casts doubt on the extraordinary public health importance of the national ambient air quality standards (NAAQS) that the lower court has remanded. As the Environmental Protection Agency (EPA) found below, those standards will make a profound difference in pollution levels to which tens of millions of Americans are exposed, thereby avoiding each year many thousands of premature deaths, hospitalizations for respiratory and cardiopulmonary illness, other adverse respiratory effects such as reduced lung function and pain on breathing, as well as missed work days. ALA Pet. 6, 12, 16 (citing EPA). The court below did not challenge these findings, and indeed resoundingly rejected attacks on EPA's decision to set a fine particle standard. App. 50-51.[1] Despite occasional hit-and-run disparagement of EPA's analysis, respondents do not seek certiorari on any aspect of the scientific underpinnings for these standards. Thus, the vital public health implications of these standards counsel strongly in favor of certiorari. Accordingly, we turn to the specific issues addressed by the petitions.

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE NONDELEGATION QUESTION, AND SHOULD REJECT RESPONDENTS' INACCURATE REFORMULATION OF THAT QUESTION.

Respondents American Trucking Associations (ATA) and Appalachian Power concede that the lower court's nondelegation ruling merits review by this Court. ATA

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[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263.

Rsp. at 1, 10; Appalachian Power Cross-Pet. at 24. *Accord,* Ohio Rsp. at 3 (Ohio does not oppose certiorari on the nondelegation question). However, they wish to reformulate the nondelegation question, and to add an additional question. ALA's response to the cross-petitions demonstrates why the proposed additional question should be rejected. The discussion below shows that respondents' proposed reformulations are meritless also.

An initial reason for rejecting respondents' formulations of the nondelegation question is that those formulations are argumentative. ATA's Question 1 assumes that EPA's interpretation was "standardless," and Appalachian Power's and Ohio's Question 1 asks this Court to remand for EPA "to exercise the discretion delegated to it by Congress to develop intelligible criteria," thus assuming that the statute itself does not specify intelligible criteria and that EPA has not exercised its discretion pursuant to the statutory criteria. These argumentative questions should be rejected in favor of the more neutral questions proposed by ALA, EPA, and Massachusetts. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

In addition, Appalachian Power's proposed question would improperly seek review of a question that is reviewable only by cross-petition, not by response. *See* ALA Rsp. to Cross-Petitions at Part V.

Finally, respondents' proposed questions ignore the essence of the lower court's nondelegation ruling. First, though that ruling was clearly based on an alleged *constitutional* violation, App. 12 (finding that the Act's language and EPA's interpretation "involve an *unconstitutional* delegation of power") (emphasis added), the Constitution is mentioned nowhere in respondents' proposed questions. Second, though the lower court plainly asserted that *Clean Air Act § 109 itself* does not set forth

an intelligible principle, App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"), respondents' proposed reformulations omit any reference to whether that ruling was correct, instead focusing only on *EPA's interpretation* of the statute.

Respondents' attempt to avoid review of the lower court's constitutional ruling concerning § 109 is understandable, given that none of them defends that ruling. Indeed, quite the contrary: ATA concedes that § 109 "undisputedly is *not*" unconstitutional. ATA Rsp. at 15 (emphasis added). *Accord*, Natl. Stone Assn. Rsp. at 8 (conceding that an " 'intelligible principle' [was] provided by Congress"). If the Act is undisputedly constitutional, however, there was no basis for the lower court to proceed to a constitutionally based evaluation of EPA's interpretation, much less to require a constitutionally based narrowing of that interpretation. *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (recent application of nondelegation doctrine has been principally limited "to giving narrow constructions to statutory delegations *that might otherwise be thought to be unconstitutional*") (emphasis added). Thus, it is particularly important that the nondelegation question be formulated to reflect the lower court's ruling concerning the constitutionality of the Act. Review of that ruling should be dispositive of the lower court's entire nondelegation ruling – *i.e.*, the portion addressing the Act as well as the portion addressing EPA's interpretation of the Act.

Even assuming arguendo that the lower court properly proceeded to evaluate EPA's interpretation, respondents' reformulated questions should still be rejected, because once again they overlook the *constitutional* aspect of the lower court's ruling. App. 12 (finding that EPA's interpretation "involve[s] an *unconstitutional* delegation

of power") (emphasis added). The core of that constitutional ruling was the lower court's demand that EPA prescribe a "*determinate criterion* for drawing lines." App. 5 (emphasis added). This Court, however, has plainly ruled that there is "[n]o[ ] . . . constitutional requirement that the legislative standards be translated by [an agency] . . . into formal and detailed rules of thumb prior to their application to a particular case," and that there is no constitutional obstacle to an agency using "the more flexible case-by-case method." *American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946). Moreover, because this Court's precedent establishes that the nondelegation doctrine does not require a determinate criterion even for statutes, ALA Pet. 18-21, the doctrine cannot possibly require such a criterion for agency *interpretations* of statutes. In short, because the constitutional aspect of the lower court's ruling concerning EPA's interpretation should be dispositive, respondents' proposal to define the Constitution out of the nondelegation question should be rejected.

Respondents' attempted justifications of their reformulations must be rejected. First, respondents argue that in the wake of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the nondelegation doctrine has changed; instead of the courts offering narrowing constructions, they should remand for the agency to do so. ATA Cross-Pet. at 5 (quoting App. 69-70), 8, 11. *See also* Appalachian Power Rsp. at 13, 15. ALA submits that this assertion – which is unsupported by any decision of this Court – is plainly wrong on the merits: the nondelegation doctrine requires Congress, not the agency, to supply an intelligible principle. For present purposes, however, it suffices to observe that respondents' argument is a *constitutional* one – *i.e.*, it is an argument about

the application of the constitutionally based nondelegation doctrine. Thus, respondents' argument undermines rather than supports respondents' attempt to omit the Constitution from the nondelegation question presented to this Court.

Second, respondents attempt to equate the lower court's nondelegation ruling with a garden variety non-constitutional remand under *Chevron* or the arbitrary and capricious standard. Appalachian Power Rsp. at 12-13; ATA Rsp. at 14. This argument is refuted by the lower court itself, which stated:

> EPA cites prior decisions of this Court holding that when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. *NRDC v. EPA*, 284 U.S. App. D.C. 136, 902 F.2d 962, 969 (D.C. Cir. 1990); *American Petroleum Inst. v. Costle*, 214 U.S. App. D.C. 358, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Lead Industries*, 647 F.2d at 1161 (D.C. Cir. 1980). We agree. But *none of those panels addressed the claim of undue delegation that we face here*, and accordingly had no occasion to ask EPA for coherence (for a "principle," to use the classic term) in making its "policy judgment."

App. 11 (emphasis added). Thus, the lower court clearly believed that its invocation of the constitutionally based nondelegation doctrine made possible a ruling that the court would not have been able to issue on non-constitutional grounds. It is precisely the lower court's *constitutionalization* of what should have been a non-constitutional administrative law question that merits this Court's review.

II. THE COURT SHOULD GRANT CERTIORARI TO PREVENT EPA'S UNDISPUTED AUTHORITY TO REVISE NAAQS FROM BEING REDUCED TO A POINTLESS EXERCISE.

Respondents' position on the Subpart 2 question strongly underscores the need for certiorari concerning EPA's authority to implement and enforce a revised ozone NAAQS. Unlike Judge Tatel, who at least concluded that a new ozone NAAQS can be implemented and enforced in areas that are attaining the pre-existing one-hour NAAQS, App. 81, respondents adopt a maximalist reading of the lower court's opinion, asserting that the new eight-hour NAAQS can *never* be implemented or enforced in *any* area. Appalachian Power Rsp. at 28; Ohio Rsp. at 2.

This reading reduces the statute to an absurdity. The lower court held – in a ruling *not* challenged by respondents in this Court – that the 1990 Amendments retained EPA's duty to revise NAAQS as appropriate, and to designate nonattainment areas pursuant to such revisions. App. 31-34. Acting pursuant to this duty, EPA carefully considered the scientific evidence, concluded that adverse health effects are occurring at ozone levels allowed by the pre-existing one-hour NAAQS, and promulgated a new NAAQS to address those effects. Yet under the lower court's ruling (as interpreted by respondents), EPA is now statutorily barred from ever implementing or enforcing this new standard anywhere, and the children and asthmatics suffering pain and reduced lung function due to ozone levels allowed by the prior NAAQS are simply abandoned to their fate. Thus, contrary to respondents' attempt to portray their position as a defense of Subpart 2 against Subpart 1, their real argument is that the new standard cannot be implemented or enforced under *either* subpart. This argument reduces the

Act to an absurdity, and flies in the face of the Act's core public health purpose.

Nor are respondents persuasive even in their chosen domain of statutory textualism. Their whole textual argument (and the lower court's holding) rests on the assertion that, because of § 181(a)(1)'s cross-reference to the entirety of § 107(d), § 181(a)(1) is not limited to the one-hour standard, but instead specifies classifications and attainment dates for *any* ozone standard – including the new eight-hour standard. This professed fidelity to statutory text is illusory, however. Tellingly, neither respondents nor the lower court was able to point to a single classification or attainment date specified by § 181(a)(1) for the eight-hour standard – or even to respond to, much less refute, ALA's arguments on this point, ALA Pet. at 25. The reason is simple: § 181(a)(1) specifies no such classifications or attainment dates.

First, for areas with a design value less than 0.121, § 181(a)(1) specifies no classifications or attainment dates: the table set forth in that provision provides classifications and attainment dates only for areas with design values of 0.121 or higher. As Judge Tatel observed, "it is difficult to see how Subpart 2 can 'specifically provide[ ]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1." App. 77.

Indeed, a recent D.C. Circuit decision – written by Judge Williams, a member of the panel below – held that § 181(a)(1) does not set forth classifications or attainment dates even for all nonattainment areas under the pre-existing one-hour standard. *American Petroleum Institute v. USEPA*, 198 F.3d 275, 278-80 (D.C. Cir. 2000) (holding that "sub-marginal" areas – *i.e.*, areas that are in nonattainment with the one-hour standard but have design values less than 0.121 – are not covered by Table 1 of § 181(a)(1);

Table 1 and nonattainment status "overlap but are distinct"). The *API* decision confirms an observation made in the lower court opinion itself. App. 33 ("not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher"). These statements undermine the lower court's conclusion that "Subpart 2 specifically provides classifications and dates for *all* areas designated nonattainment under *any* ozone NAAQS." App. 34-35 (emphasis added).

A second reason why respondents' (and the lower court's) textual argument fails is that neither respondents nor the lower court was willing to acknowledge – much less accept – the implications of that argument. For nonattainment areas under the new NAAQS whose design values are between 0.121 and 0.160, that argument would lead to the conclusion that those areas have attainment dates that *had already passed* as of the date when the 1997 ozone standard was promulgated. § 181(a)(1) (setting forth a 1993 deadline for areas with design value from 0.121 to 0.138, and a 1996 deadline for areas with design value from 0.138 to 0.160). Respondents' (and the lower court's) unwillingness to follow their textual argument to its absurd conclusion – or even to respond to ALA's discussion of this point – undermines the alleged textual basis for the lower court's ruling.

In addition to its incorrect rulings concerning classifications and attainment dates, the lower court also incorrectly held (App. 31) that the "control measures" of Subpart 2 oust those of Subpart 1 for purposes of the new eight-hour NAAQS. Respondents do not point to any statutory provision that ousts the Subpart 1 control measure requirements. *See* ALA Pet. 26 (noting that the lower court had not pointed to any such provision, and that no such provision exists). Instead, respondents argue that

" 'ouster' language is not needed in these later subsections of § 172 once areas are 'ousted' from the deadline and classification provisions that trigger the planning requirements." Appalachian Power Rsp. at 26 n.49. To the contrary, the statute plainly provides that the control measure requirements are triggered by "the designation of an area as nonattainment with respect to a national ambient air quality standard under section 107(d)." § 172(b). In a holding not challenged by respondents, the lower court ruled that the § 107(d) designation provision does apply to the new NAAQS. App. 33-34 (EPA is required to designate nonattainment areas under the new NAAQS). Accordingly, absent an ouster provision, the control measures triggered by this designation apply as well.

Unable to defend the lower court's Subpart 2 holding, respondents argue that the holding is not appropriate for certiorari. In doing so, they mischaracterize the Subpart 2 question as simply alleging "the misapplication of a properly stated rule of law." ATA Rsp. at 19 (quoting Sup. Ct. R. 10). To the contrary, the Subpart 2 question is itself a question of law – *i.e.*, of the proper interpretation of the Clean Air Act. This Court's rules plainly contemplate review of "important question[s] of federal law," Sup. Ct. R. 10(c), and respondents cannot seriously deny the importance of the question whether EPA has authority to implement and enforce nationwide air quality standards affecting the exposure of millions of Americans to harmful air pollution.

Finally, respondents argue that the Subpart 2 ruling is interlocutory, because EPA must pursue a remand to address the alleged beneficial health effects of ozone. Appalachian Power Rsp. at 29-30; ATA Rsp. at 16-18. That remand would be a pointless exercise, however, if EPA

were barred from implementing or enforcing any resulting ozone standard. Moreover, there is no basis for respondents' suggestion (ATA Rsp. at 20) that the Subpart 2 question should be presented to the D.C. Circuit yet again before this Court accepts review. While the lower court indicated that "[t]he *remaining* issues" – *i.e.*, those not yet expressly ruled on – could not be resolved pending completion of the remand, App. 4 (emphasis added), the court nowhere invited post-remand reargument of the Subpart 2 question. That question, having already been considered by the lower court twice (on the merits and on rehearing), is clearly ripe for this Court's review.

DATED: April 13, 2000.

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